147 U. S. 261

RECORD, CASE No. 15,124.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1892.

TERM No., 1154.

THE CITY OF NEW ORLEANS, APPELLANT,

vs.

RUFFIN B. PAINE, UNITED STATES DEPUTY SURVEYOR.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

FILED SEPTEMBER 5, 1892.

considering whether or not a perpetual injunction shall be granted. Mr. Kerr states the rule as follows (Kerr on Injunctions, p. 43):

"The Court will, in general, have regard, not only to the dry, strict rights of the plaintiff and defendant, but also to the surrounding circumstances, before it exercises the jurisdiction. The consideration of the balance of convenience and inconvenience in granting or withholding the injunction is not neglected by the Court. If the granting of the injunction would have the effect of inflicting serious damages upon the defendant without restoring, or tending to restore, the plaintiff to the position in which he originally stood, or doing him any real practical good, or if the mischief complained of can be properly, fully and adequately compensated by a pecuniary sum, an injunction will not issue."

Certainly, where the fact of damage has not been established, and, at best, the testimony merely tends to show slight and inconsiderable damage, the Court will properly remit the complainant to his action at law, and decline to subject a defendant to the disadvantage and injustice of such a result as that claimed by the complainant in the present case. The present case is merely a case of failure to establish a right with sufficient certainty to justify the interposition of equity by extraordinary process.

Upon the foregoing considerations we submit that the decree of the Court below should be affirmed.

JOHN F. DILLON,
WINSLOW S. PIERCE,
For Appellees.

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1 UNITED STATES OF AMERICA, }
Fifth Judicial Circuit. }

Pleas and proceedings had and done at a regular term of the United States circuit court of appeals for the fifth circuit, begun and held, pursuant to law, in the court-room of said court, in the city of New Orleans, on the third Monday of November, 1891.

THE CITY OF NEW ORLEANS, Appellant,
vs.
RUFFIN B. PAINE, United States Deputy Surveyor, Appellee.

Be it remembered that on the 29th day of March, 1892, a transcript of the record of the above cause in the United States circuit court for the eastern district of Louisiana was filed in said United States circuit court of appeals for the fifth circuit in the words and figures following, to wit:

2 (*Bill of Complaint. Filed December* 18, 1891.)

To the honorable the judges of the circuit court of the United States for the fifth circuit and eastern district of Louisiana, holding sessions at New Orleans, in said district, sitting in equity:

Your complainant, The City of New Orleans, in the State of Louisiana, a municipal corporation created under the laws of said State, herein suing as residuary legatee under the will of John McDonough, deceased, bring- this *their* bill of complaint against Ruffin B. Paine, a deputy of Charles B. Wilson, the United States surveyor general in and for the State of Louisiana, the said surveyor general residing and performing his duties in the city of New Orleans and the said deputy now camping and sojourning in the parish of Saint John the Baptist, in the eastern district of Louisiana, and a citizen of said State.

And thereupon your orator complains and says—

That the said late John McDonough died testate, in the State of Louisiana, on the 27th day of October, in the year 1850, at his domicile, near the city of New Orleans, seized of a large estate, consisting very largely of unimproved wild lands in various parishes of said State, and among the said lands the following tracts of swamp land, situated wholly or in part in the parishes of Saint James, Ascension, Saint John the Baptist, and Livingston, on the east side of the Mississippi river.

1st. A tract of land beginning 80 arpents from said river and corresponding to a front on said stream of 25 arpents 6 toises and 8 feet, and extending back by diverging side lines to the Amite river, a distance of about 15 miles, on which stream it has an extensive front, estimated in the inventory and mortuary proceedings of the said John McDonough to contain from 61,000 to 80,000 arpents.

That said tract of land began at 80 arpents from the said Mississippi river and in the rear of the plantation belonging in the year

1850 to Dr. Louis Fortin and in part by Shepherd's Golden Grove plantation, and for greater accuracy of description is designated by the letters C, D, E, and F on the plan marked "Exhibit A," made a part of this bill for purposes of description.

2d. An undivided interest of one-third in a tract of land situated on the same side of the said river, now in the parishes of Saint John and Livingston, commencing at 40 arpents from said river lying next below and joining in all its depth the first-described tract, and commencing in the rear of the plantation formerly belonging to Henry Fontenot (which has a front on the river of 8 arpens 4 toises and 3 feet), the whole of said tract estimated in the said inventory and mortuary proceedings of the said John McDonough, Jr., to contain from 15,000 to 20,000 superficial arpents, and extending by diverging side lines back to the Lake Maurepas or the Amite river, on both or either of which it has an extensive front, and is designated by the letters G, H, I, and D on the aforesaid plan marked "Exhibit A."

That by the last will and testament of the said John McDonough, Jr., the mass of his estate, including the two foregoing tracts of land, was bequeathed in equal portions to your orator, The City of New Orleans, in the State of Louisiana, and the city of Baltimore, in the State of Maryland, as residuary legatees, to be held and used or disposed of by the said cities for charitable uses, "and especially for the establishment and support of free schools in said cities and in their respective suburbs (including the town of McDonough as a suburb of New Orleans), wherein the poor (and the poor only)
3 of both sexes and all classes and casts of color should have admittance free of expense for the purpose of being instructed in the knowledge of the Lord and in reading, writing, arithmetic, history, geography, etc., etc."

That said last will and testament was duly probated in the fifth district court for the parish of Orleans and State of Louisiana, and was in due course recognized and ordered to be executed by a judgment of said court bearing date the 28th of October, 1850, in the matter of the succession of the said John McDonogh, No. 4112 of the docket of said court.

And your orator further says that on or about the 3d day of April, 1769, the competent colonial authorities of the King of France in the then province of Louisiana, Aubry and Fourcault, made a complete grant in favor of one Pierre Delille Duparc or Dupard of a large tract of land, thus described: "30 arpents of front to the river, upon the whole depth which shall be found unto Lake Maurepas, of the land where heretofore were two villages of the Collapissas savages, situated about 16 leagues above and on the same side with this city, to take from the plantation of one named —— Allemand, unto its junction with that of a (person) named Joseph Lacomb, a free mulatto;" which said grant was executed in due form of law on said 3d April, 1769, at New Orleans, the capital of said province, and was countersigned by Sonbre & Duvergne and delivered to said grantee.

That subsequently, but prior to the month of August, 1790, the

Spanish governor of said province, which had then passed by treaties under the dominion and possession of Spain, Don Estevan Miro, made and issued a decree ordering Don Carlos Trudeau, the royal surveyor general of the province, to survey said lands so granted by France to the said Duparc, and to partition the same among the five heirs of said grantee or their assigns; all of which was accordingly done by the said Don Carlos Trudeau in the month of August, in the year 1790.

That these proceedings under said Spanish authorities operated — a recognition and affirmance by Spain of said French grant to said Duparc in all its parts and to its full extent in fact and law.

That by the 3d article of the treaty between Spain and France concluded at Saint Il Defonso on the 1st of October, 1800, the former sovereign ceded to the latter the province of Louisiana, with limits embracing the lands granted as aforesaid to Pierre Delille Duparc, and by the 1st article of the treaty between the Republics of France and the United States concluded at Paris on the 30th day of April, 1803 (8th Stats. at Large, p. 200), the said province with the same limits was ceded to the United States, who took possession of the portion of the same embracing the now State of Louisiana, at New Orleans, on the 20th of December, 1803.

And that by the 3d article of said treaty the aforesaid grant to Dupard was pledged to be respected as property and to be protected as such by the United States.

That in due course of time the United States, in fulfillment of this pledge of security and protection, provided by law means whereby the inhabitants of the ceded territory might present their titles and claims to land therein, have the same registered and proved, and brought to the notice of the Government in order to secure its recognition and confirmation.

That under different laws passed from time to time boards of land commissioners were appointed and were organized in said province, and the province itself was under said laws divided into districts and territories for the greater convenience of the inhabitants.

That in due course of time the proprietors of the different portions of said land granted as aforesaid to Pierre Delille Duparc, and who had acquired the same in various modes from the said five heirs of said Duparc, presented their respective claims and titles before some of said boards of commissioners for their consideration and report to the Congress of the United States.

That among the persons so filing claims to portions of said land were the firm of John McDonogh, Jr., & Company, then a commercial partnership doing business in the town of New Orleans, in the now State of Louisiana, consisting of John McDonogh, Jr.,
4 and Shepard Brown; which company filed before the register and receiver of the United States land office for the eastern land district of the State of Louisiana, acting as a board of land commissioners under authority of the act of Congress approved on the 27th of February, 1813 (2d Stats., 807), their title and claim to a portion of said lands, described as having thirty-two arpents front

on the Mississippi river, with a depth as far as the Lake Maurepas, with side lines diverging as they extended into the interior of the country, and which said tract of land is designated by the letters T, C, D, E, J, K, and N on said "Exhibit A."

That on the 20th of November, 1816, the said commissioners made their report upon said claim and many others to the Commissioner of the General Land Office, as required by law, which officer, on the 16th of January, 1817, by letter of that date, transmitted the same to the Congress of the United States for their action thereon. (See said report published in the American State Papers, Public Lands, vol. 3, p. 254 and 268, Gales & Seaton's ed.)

That in their report the said commissioners included said claim of John McDonogh, Jr., & Co. under the No. 406 in class third, species the first, and recommended the same for confirmation, if the same did not then stand confirmed under then existing laws. (See remarks under head of Appendix on p. 267.)

That on the 3d March, 1819, the said John McDonogh, as surviving partner of the said firm of John McDonogh, Jr., & Co., by act before Michael De Armas, a notary public in and for the city of New Orleans, La., had sold and conveyed to Lewis H. Guerlain a portion of said tract of land so afterwards confirmed to him and designated on said "plan A" by the letters C, D, E, J, and K, which said portion began at a distance of 80 arpents from the Mississippi river, at which distance it had a width corresponding to a front on said river of 7 arpents 3 toises and 5 feet, and extending by diverging side lines back to the Amite river, on which it had an extensive front, the upper side line of said tract so conveyed being the upper side line of the aforementioned French grant made to the said P. D. Duparc or Dupard on the 3d day of April, in the year A. D. 1769, and which is designated on said Exhibit "A" for purposes of better description by the letters F, E, J, and K.

That by section one of the act of Congress approved on the 11th May, 1820 (3d Stats., 573), Congress confirmed the said claim thus reported to them, and thereby ratified and established the right and title of the said John McDonogh, Jr., & Co. to all the land embraced in their said claim as heretofore described.

And your orator further shows—

That among the persons so filing claims to portions of the aforesaid grant to Deparc was also Henry Fontenot, who filed his said claim for the recognition and confirmation by the United States before their board of commissioners for the eastern district of Louisiana, sitting at New Orleans, in said State, and exercising jurisdiction under the act of Congress approved May 11th, 1820 (3 Stats., 573), which board reported the same for confirmation in its report dated January 6th, 1821, in which report the said claim is described as claim No. 57 in the first class, as will appear by vol. 3 of the American State Papers, p. 583, Gales & Seaton's ed.; that by the act of Congress approved on the 28th of February, 1823 (3 Stats., 727), the said claim was ratified and confirmed by the United States as described by said board, which said claim of said Henry Fontenot thus confirmed embraces the same land as that heretofore

secondly described by your orator, and of which your orator owns, as aforesaid, an undivided interest of one-third, as shown by the letters H, I, D, and G on said plan marked "Exhibit A" as aforesaid.

And your orator further shows—

That the United States, through their proper executive department, have by their surveys of private claims and public lands recognized and enforced the said grant made to Duparc and the subdivisions and parts thereof so claimed as aforesaid by said John McDonogh & Co. and Henry Fontenot, as will more fully appear by the certified copies and plans of said surveys to be exhibited on the trial hereof.

5 That on or about the 6th of February, 1812, the said Shephard Brown departed this life in the city of Baltimore, leaving a last will and testament, by which he appointed John McDonogh, Jr., W. W. Montgomery, and John H. Brown the executors of his estate, which will was admitted to probate and duly proven and ordered to be executed by the second district court for the parish of Orleans, in said State of Louisiana, and that the interest of said Shephard Brown in said tract of land heretofore described by the letters C, D, E, J, and K was sold and conveyed to the said John McDonogh, Jr., by the said executors, W. W. Montgomery and John H. Brown, by acts of sale passed on the 29th of June, 1818, before M. de Armas, a notary public in New Orleans, Louisiana, as by duly certified copies of said acts when produced will appear.

And your orator further says that in the suit of your orator against the city of Baltimore, No. 11578 of the docket of the fifth district court for the city of New Orleans, your orator demanded that the property left by said McDonogh to said cities should be partitioned in kind, which was ordered to be done by the judgment of said court rendered on the 26th June, 1857, which judgment was affirmed on appeal by the supreme court of the State of Louisiana on the 8th March, 1858, as will appear by the 13th vol. of the Louisiana Annual Reports, p. 163, etc.

That accordingly and in pursuance of these proceedings the portion of said tract of land first hereinbefore described, situated north of and contiguous to the line of the Houmas grant, estimated to contain from 51,000 to 70,000 acres, and extending from said line to the Amite river, and now situated in the parishes of Ascension and Livingston, was allotted to and became the sole property of your orator, The City of New Orleans, which city accepted said bequest and said trusts and entered upon the faithful execution of the same and has continued to do so up to this time, and which said tract, containing from 51,000 to 70,000 acres, is represented on said plan or Exhibit "A" by the letters L, D, E, and M.

And also the undivided third interest or share of the said McDonogh in the second above described tract of land by said partition and proceedings became the sole property of your orator, who accepted the same and the trusts aforesaid with respect to the same and has continued to hold the same to this day subject to said uses

and trusts, the said undivided third interest being from 5,000 to 6,666 acres.

And your orator further shows—

That your orator holds all of the said lands as trustee under the said will of the said McDonogh for the sole purpose of the establishment and support of free schools, wherein the poor and the poor only of both sexes of all classes and casts of color shall have admittance free of expense for the purpose of being educated in religion, morality, agriculture, and the usual branches of useful knowledge.

That in carrying out this benevolent design of the deceased philanthropist your orator has erected in and about the city of New Orleans suitable buildings and appliances for a large number of schools wherein a large number of poor and friendless boys and girls receive the blessing freely given and gratefully received of a practical education as aforesaid; that these establishments are maintained solely from the revenues your orator is enabled to derive from the property bequeathed to your orator as aforesaid and in the proceedings aforesaid set apart as the share and interest of your orator.

That this is a trust property, consecrated to noble and honorable uses, and should be protected with a zealous arm by all men and especially by the equity courts of the country.

And your orator further shows that the United States have from time to time made public and official surveys of portions of the private land claims of which the foregoing-described tracts of land form parts and have duly approved the same, and by said surveys and the approved township maps compiled from the same your orator is able to more particularly describe said lands.

6 And your orator further shows that after the United States had caused to be surveyed and located by an approved public survey the upper side line of said French grant extending from the Mississippi river back to the Amite river, a distance of about twenty-two miles, and which line is represented on said "Exhibit A" by the letters N, K, and J, and had also surveyed in like manner the front of said grant on said Mississippi river and the lower side line of said grant from said river back to the south shore of the Blind river, near or at its entrance into Lake Maurepas, and which line is about 12 miles long and is represented on said "Exhibit A" by the letters O, B, and P, it became a question with the executive officers and agents of the Land Department of the United States having jurisdiction over such matters, to what depth from the Mississippi river should said French grant so as aforesaid made to Dupare or Dupard in the year 1769 be surveyed and recognized by them and by said executive department.

That in due course and according to the rules and forms of proceeding in such cases in said department the Commissioner of the General Land Office, on May 19, 1885, directed the surveyor general of Louisiana to try and decide all questions of law and fact involved in that question upon such evidence and arguments as might be produced and made before him by all parties in interest for that purpose, giving said parties due notice and allowing full time and opportunity to be heard.

And that, accordingly, after due proceedings, said surveyor general, on the 20th of January, 1886, made and sent to the said Commissioner his decision on said matters, in which he held that said grant was entitled, under the guaranties of the treaty with France of 30th of April, 1803, and of the laws of the United States and the reports of their several boards of commissioners upon the subject, to be recognized and surveyed with depth extending from the Mississippi river back to Lake Maurepas and the Amite river by extending its lower side line back to said water boundary, which would, with the public surveys theretofore made, complete the survey and location of the same.

That this decision having been taken by appeal to the said Comsioner of the General Land Office, that officer, after full argument and due consideration, rendered and made his decision thereon and on the issues of law and fact aforesaid and sustained in all things the said decision of said surveyor general, all of which will more fully appear by reference to said last-named decision as printed in vol. 14, p. 108, of Copp's Land Owner.

That thereafter, on appeal taken from said last decision of said Commissioner to the Hon. Secretary of the Interior, the said Secretary, Hon. L. Q. C. Lamar, made and rendered his decision, after full argument and due consideration, sustaining the aforesaid decision of said Commissioner in all matters and things except as to the depth to which said grant to Dupard should extend, holding that such depth should be determined by a line to be run from the lowest point of the southern shore of Lake Maurepas at right angles to a line drawn through the centre of said grant from the Mississippi to the rear, as the same will more fully appear by reference to said decision in vol. 6, p. 473, 481, of "Decisions of the Department of the Interior relating to public lands," and by a duly certified copy thereof, marked "Exhibit B" and made a part of this bill.

That to enforce said decision and to finish the survey and location of said grant to Dupard the surveyor general of Louisiana, on the 11th of November, 1889, in obedience to special instructions to that effect from the Commissioner of the General Land Office, entered into contract and bond with the defendant herein, the said Ruffin B. Pain, thereby constituting him his deputy and agent in the premises, by virtue of which contract he was authorized, among other surveys in said contract named, to complete the survey and location of the claims of John McDonogh, Jr., & Co. and of Henry Fontenot (meaning the grant to said Dupard), as required by said decision of the Hon. L. Q. C. Lamar, Secretary of the Interior, heretofore referred to, of date the 6th of January, 1888; that at the same time,

7 to wit, the 11th November, 1889, the said surveyor general issued in writing his special instructions to his said deputy, said Ruffin B. Paine, requiring him and giving him authority to take evidence as to the fact whether or not the southern shore of Lake Maurepas had moved or changed since the date of the said grant to Dupard in 1769, and if satisfied it had so moved or changed then to run said back line of said grant in a western course from the point occupied by said shore line in said year 1769, and in other

respects to survey and locate the same as required by the aforesaid decision of Secretary Lamar, as will more fully appear by a duly certified copy of such special instructions hereto annexed as a part of this bill and marked "Exhibit C."

That said contract and special instructions having been duly submitted by the Commissioner of the General Land Office to the Secretary of the Interior for approval or disapproval, said Secretary approved the same in all things except that he directed that the back line of said grant, instead of being run in a west course from the southern point of said lake, should be so run as to be at right angles to a line projected through the centre of said grant from its front to its rear; that accordingly the said surveyor general made and issued his supplemental special instructions to his said deputy, said R. B. Paine, under date of February 24, 1890, modifying his former instructions, as above stated, and requiring him to survey said back line from the southern shore of Lake Maurepas as it was situated in the year 1769 in a course at right angles to the axis of said grant, and to make said line, when so run and completed, the limit in the rear of said French grant to Dupard; all of which will more fully appear from a duly certified copy of said supplementary special instructions filed as part of this bill and marked "Exhibit D."

And that on the 4th day of March, 1890, the said Commissioner of the General Land Office wrote officially to the said surveyor general, informing him that he had duly approved said contract entered into with said R. B. Paine and said special instructions so given said Paine under dates of Nov. 11, 1889, and Feb. 24, 1890, as will appear by a duly certified copy of said letter, marked "Exhibit E," herewith filed as a part of this bill.

And your orator further *shows* that in pursuance of said contract and special instructions the said R. B. Paine, deputy surveyor, made an examination of the southern shore of Lake Maurepas and the whole region in and about the field of his work and took and procured proof of witnesses, old surveys, etc., and finally decided that said southern shore line had moved considerably to the south of the position it occupied on the 3d of April, in the year 1769, the date of said grant to Dupard, and accordingly surveyed and located said back line of said grant by starting from a point north of where the shore line of said lake was at the time of his said survey, but where he found the same was in the year 1769, and from said point he ran and established said back line on a course from such point a little south of west and at right angles to the axis of said grant as heretofore stated, said line being represented on said "Exhibit A" by the letters A and B, and the same line is also represented by the letters A and B on a plan certified by the surveyor general of Louisiana on the 4th June, 1891, and herewith filed as "Exhibit F" and made a part of this bill for purpose of description, all of which will further appear by a duly certified extract from the field-notes and returns made by said Ruffin B. Paine, deputy surveyor, to said surveyor general, which have been duly approved, marked "Exhibit G" and made a part of this bill.

That on the 25th day of November, 1890, the said surveyor general approved the said survey and location of said back line of said French grant to Dupard, as surveyed and located aforesaid by said R. B. Paine, and approved the usual township maps exhibiting that survey and the other surveys executed by the said surveyor under his contract and instructions aforesaid—that is to say, the maps of T. 10 S., ranges 4, 5, and 6 east—and sent duplicates thereof to the General Land Office in Washington, and in due course the United States caused the whole of said work to be tested and examined in the field by their field examiner, John L. McManus, Jr., who found the same truly and faithfully done, and so reported officially to
8 the said surveyor general and through him to the said Commissioner of the General Land Office; and thereupon and in due official course the said surveys of the said R. B. Paine were duly paid for by the United States, including his said survey and location of said back line of said Dupard grant.

And your orator further shows unto your honors that all of the aforesaid decisions and rulings, surveys and examination and contracts and special instructions and approvals and payment, having been made and entered into and done by, through, and for officers of the United States having full power and jurisdiction, under the laws, usages, and customs controlling such matters, to make, do, and perform the same, your orator considered that its rights and its possession and enjoyment of the lands heretofore described were finally settled, ascertained, and secured to your orator, though the result of said decisions and surveys was to annul and destroy those rights to nearly the whole quantity of land acquired by your orator under the will of the said John McDonogh as heretofore set forth; that said decisions and surveys thus annulled and destroyed, so far as the executive officers of the United States could lawfully divest and destroy vested rights, the right of your orator in and to all the land in the tract firstly described, except the tract represented on said Exhibit "A" by the letters M, L, Q, and R, containing about 4,000 acres, and all the land in the tract secondly described, except the one-third undivided interest in the tract represented on said Exhibit "A" by the letters H, B, Q, L, C, and G, the estimated total of all which lands, so lost to your orator, amounting to 51,000 acres.

That notwithstanding this great wrong and injury to the estate so vested in your orator for the uses and trusts heretofore stated and the consequent losses to the revenues to be derived from said lands which might have been applied by your orator to the support of the schools built by your orator under the said will of said McDonogh, your orator was compelled to accept the same as a final though tardy settlement of the questions of title and location which had so long injuriously affected your orator's interests in said lands.

That accordingly and in order to derive a revenue from and to administer whatever of said lands remained to your orator after said decisions and surveys, your orator took possession of the same by its agents and expended money in fixing the limits of the same and in protecting the timber on the same, for which alone the said

lands are valuable, and is now in possession thereof, protecting the same from spoliation, and arranging for selling the same or for deriving in some other way a revenue from the same.

And your orator further shows that notwithstanding all that had been decided and done and finished as aforesaid in and about the premises, and especially in the final survey and fixing by the competent authorities of the United States of the back or rear boundary line of said grant to Dupard of 1769, the Commissioner of the General Land Office wrote to the Secretary of the Interior on the 20th of March, 1891, asking, in substance, whether the former Secretary, Mr. Lamar, in his said decision of the 6th of January, 1888, fixing the southern shore of Lake Maurepas as the initial point to control the survey of said back line of the grant to Dupard, intended the said shore as it existed in the year 1769, when said grant was made, or as it should be found to exist when the said line should be actually surveyed and located; that in reply to this letter the Assistant Secretary of the Interior, Mr. George Chandler, made his decision or ruling in the matter, advising said Commissioner that the said decision of Mr. Lamar fixed absolutely as the initial point to control said survey the southern shore of said lake, as the same should be found at that date, to wit, the 14th day of May, 1891; and the said Assistant Secretary further ordered said Commissioner to instruct the surveyor general accordingly, as will more fully appear by reference to a duly certified copy of said supplemental ruling, herewith filed as a part of this bill and marked "Exhibit H," and as also appears by a copy of the same on p. 496, vol. 12, of the Decisions of the Department of the Interior.

That on May 21, 1891, the said Commissioner wrote to said surveyor general instructing him that although the survey of said back line had been done in accordance with the contract and
9 instructions aforesaid and had been paid for and had been approved by the said surveyor general and by the General Land Office, yet that it was rejected, and that a new line should be surveyed in conformity to said opinion of said Assistant Secretary, dated as aforesaid May 14, 1891.

That accordingly, on the 5th of June, 1891, the said surveyor general entered into a contract with and issued his special instructions or authority to the said R. B. Paine, his deputy as surveyor general, authorizing and empowering him to go upon the lands of your orator, with such assistants as were necessary, and to destroy and obliterate the said back line or boundary previously established and fixed by him as aforesaid, and to run a new back line or boundary as required in said opinion of said Assistant Secretary of the 14th of May, 1891, and to fix the same as the northern limit or rear line of said French grant to Dupard and of the said private land claims of John McDonogh, Jr., & Co., and said Henry Fontenot, as the same will duly appear by certified copies of the said letter of May 21, 1891, and said special instructions and contract of June 5th, 1891, herewith filed as parts of this bill and marked Exhibits I, J, and K.

That on the 10th of July, 1891, the said Commissioner, to whom

the same had been sent for approval by the surveyor general, wrote said surveyor general, approving said last-named special instructions to said R. B. Paine and said contract, as will appear by a certified copy of the said letter, filed as a part of this bill and marked "Exhibit L."

And now so it is, may it please your honors, that the said Ruffin B. Paine, deputy of the said Charles B. Wilson, U. S. surveyor general for Louisiana, pretending that he has lawful authority to disregard the back line or rear boundary of said grant to Dupard as heretofore established by him, which said line fixed and determines the depth of said grant from the Mississippi river, and upon which the valuable rights of your orator depends as aforesaid, and that he has lawful authority to run and fix the new line or boundary to said grant as heretofore set forth by your orator, is now proceeding to destroy and obliterate said old line and fix and establish said new one, and for those purposes is actually now encamped upon said lands of your orator so secured to your orator by law, the treaty with France of April 30, 1803, and by said decision of Secretary Lamar and by said survey of said back line made in pursuance thereto, with a company of flagman and chain-carriers and other assistants, and is engaged in doing and committing said wrongs and in opening up and blazing lines and putting up corners and cuttings ways through said lands, and will, after surveying said new back line, proceed to survey into sections and other legal divisions and subdivisions as public lands of the United States all the lands aforesaid of your orator found by him to be situated north of said new back line and south of the old or rejected back lines, estimated to be 4,400 acres.

That said new back line will when surveyed run through the lands of your orator as represented by the letters S and M on the said "Exhibit A," and will cut off as public land of the United States the tracts contiguous to and on the north of the same represented on said "Exhibit A" by the letters S, B, R, and M, and which said tracts contain together 5,300 acres, more or less, the estate and interest of your orator in which is worth from fifteen thousand to twenty thousand dollars, being 4,400 acres as aforesaid.

Now, your orator shows that the said R. B. Paine pretends or will pretend that he is doing the acts and things complained of and which are being done against the protest of your orator by virtue of authority conferred upon him by said supplementary opinion of the Assistant Secretary of the Interior, dated May 14, 1891, and the said letters of the Commissioner of the General Land Office of May 21 and July 10, 1891, and especially the said special instructions to him from said surveyor general, dated June 5, 1891, and said contract dated June 5, 1891; but your orator avers that none of said opinions, letters, or instructions and no other decisions, opinions, letters, or instructions are lawful or can have any effect whatsoever to legalize or justify the wrongful acts complained of, because your orator says that the same are in plain violation of the judgment and decision of the Secretary of the Interior in the premises made on the 6th day of January, 1888, and con-

stitute and are a reversal and annulment of the same and deprive your orator of your orator's property and estate in the same and in the lands secured by the survey made in pursuance of the same and approved as aforesaid by the surveyor general and the Commissioner of the General Land Office.

Your orator avers that the true meaning of the said decision, the only meaning at all consistent with reason and authority as always applied in the construction of ancient grants, was that the initial point to control the location of the back line of the grant made to Dupard in the year 1769 was the southern shore of the lake as it was known to be when the grant was made, and not as it might be found one hundred and twenty years after that time, and that therefore the said opinion of the said Assistant Secretary, if enforced as the defendant is proceeding to enforce the same, will practically be a reversal and repeal of the same, destroying valuable and extensive rights of your orator, though the same on its face purports only to be a construction and enforcement of said decision as made by said Secretary.

That it was a violation of law and of the usages and rules of the Land Department for an assistant in the Secretary's office more than three years afterwards to cancel and reverse a decision of the head — that department rendered under a former administration of the same, and thus to destroy private rights of great extent dependent thereon, and to declare as public lands of the United States many thousands of acres of valuable land declared by the former to be the property of a citizen.

That said defendant, R. B. Paine, unless restrained by your honors, will, after surveying and locating said new back line by running the same from the southern shore of Lake Maurepas as the same existed on the 14th May, 1891, or on the 6th of January, 1888, or as the same now exists, proceed under his instructions aforesaid to survey as public lands of the United States all the lands of your orator situated to the north of said line as preparatory to the disposal of the same in small parcels, not exceeding 160 acres each, to actual settlers and cultivators, called homesteaders, under the general land laws of the United States, and more particularly under the provisions of the act of Congress commonly called "the Gay bill," approved on the 2d of March, 1889. (25 Stats., 877.)

That so soon as said line is run and the other field-work done and all the returns and field-notes approved by the proper authority all the said lands will be opened to entry as aforesaid by large numbers of persons, who will go upon and settle on the same and will cut and remove therefrom the valuable cypress and ash timber and wood which give the chief value to the said lands and will commit other trespasses on the same, to the total ruin and destruction of your orator's estate in the same; that all or nearly all the land adjacent to said lands and which is not private property and which has been surveyed as public land has been so settled upon by large numbers of persons, who are, under color of right, cutting and removing the timber therefrom, and large numbers of such persons and other persons stand ready to invade the said lands of your or-

ator so soon as said surveys are finished and approved; that already the said acts and doings of the said Assistant Secretary of the Interior and said Commissioner and the said surveyor general, and more especially said R. B. Paine, surveyor, &c., have injured the rights of your orator in and to said lands by casting suspicion and doubt on the title and by encouraging numbers of landless and homeless people to take possession of the same and commit thereon trespasses and to deny the right of your orator to the same.

That all this is contrary to equity and good conscience, and if persisted in must certainly result in breeding a multiplicity of ejectment suits, at great expense to your orator, in many and conflicting jurisdictions, during the pendency of which said estate would be eaten up with the costs and expenses attending such great number of suits and the timber on the same be cut and removed.

That the persons who would make the ent-ies and do the wrongs now impending are mostly people of little or no means, against
11 whom judgments at law dispossessing them from said lands could not be effectively enforced and judgments for pecuniary damages and for costs could not be collected.

That all of the said lands of your orator are known as swamp lands and are chiefly valuable for the wood and timber growing upon them, the most valuable and abundant of which is cypress timber, and that the said lands are none of them fit for cultivation, but are low, wet, swampy lands, which will be of no value at all to your orator after the timber is removed from them.

In consideration whereof, and forasmuch as your orator can only have adequate relief in the premises in this honorable court, where matters of this nature are properly cognizable and relievable, and cannot have a plain, adequate, and complete remedy at law and is only relievable in equity, your orator prays—

That an order may now be granted restraining the defendant, Ruffin B. Paine, deputy of Charles B. Wilson, surveyor general of the United States for the State of Louisiana, from surveying and locating the new back line or rear boundary of the French grant made to Pierre Delille Dupard or Duparc, as authorized and required to do by his special instructions issued to him on the 5th of June, 1891, by the said surveyor general, and also that he be restrained from surveying as public lands and dividing the same into sections and other divisions and subdivisions under the land system of the United States any of the lands of your orator situated north of and contiguous to said new back line, and described on the said "Exhibit A" by the letters S, B, R, and M until the further orders of your honors.

And that it may please your honors and this court to now grant your orator the writ of subpœna issuing out of this court and under the seal thereof, directed to the said Ruffin B. Paine, deputy surveyor, etc., commanding him, by a certain day and under a stated penalty, to appear before this court and answer all the premises aforesaid, and then, after all further proceedings, to abide by such order and decree herein as shall be agreeable to equity and to good conscience and to this court.

And that it may please your honors and this court, on such final hearing of this action, to grant to your orator, issuing out of and under the seal of this court, a perpetual writ of injunction, directed to the defendant, as a U. S. deputy surveyor for the State of Louisiana, under the penalties provided by law, that said defendant shall absolutely desist and refrain from proceeding any further under said contract with said surveyor general and said special instructions dated and issued to him on the 5th day of June, 1891, by the said surveyor general for Louisiana, and from surveying and locating any new back line or rear boundary of said French grant to Dupard made in the year 1769, and from surveying as public lands any of the aforedescribed lands of your orator designated on Exhibit A attached to this bill by the letters S, B, R and M, supposed to contain 5,300 acres, and contiguous to said new line, and from entering on and marking trees and putting up corners and trespassing upon said lands of your orater so acquired by your orator as aforesaid under the will of the said John McDonogh, Jr.

And your orator prays that he may have such other relief in the premises as shall be agreeable to equity and to good conscience.

(Signed) J. L. BRADFORD,
Counsel for Complainant.

STATE OF LOUISIANA, }
Parish of Orleans. }

Joseph A. Shakspeare, mayor of the city of New Orleans, the said city of New Orleans being complainant in the above bill, being duly sworn, doth depose and say—

That he is mayor and chief executive officer of complainant and president of the board of commissioners of the McDonogh school fund of said city.

That said board has the care and administration of all funds and other property, real, personal, and mixed, bequeathed to the city of New Orleans by the late John McDonogh for the suport of common schools in and about said city.

12 That he has read the above bill of complaint, and that he has good reason to believe and does verily believe that the facts therein stated are true.

(Signed) JOS. A. SHAKSPEARE, *Mayor.*

Sworn to and subscribed before me this 18th day of December, A. D. 1891.

[L. S.] (Signed) CAS. H. SHIELDS, *Not. Pub.*

STATE OF LOUISIANA, }
Parish of Orleans. }

James L. Bradford, being duly sworn, doth depose and say—

That he is the solicitor of the complainant in the above bill of complaint and well acquainted with all the facts and matters in said bill contained, and with the lands described therein, and with the defendant named therein, Ruffin B. Paine.

That all the matters stated therein as facts are true as therein stated, and matters stated on information and belief are verily believed to be true.

That the said defendant is now engaged in doing the acts and things complained of and will finish and perform said acts unless restrained by process of law, and that the necessary and legal consequences of said acts, when completed and performed, will work irreparable injury to the estate of complainant in said lands, will result in settling large numbers of squatters on the same, who will cut and remove the timber and generally commit such acts of trespass and spoliation as to ruin said lands completely and render them of little or no value.

(Signed) J. L. BRADFORD.

Sworn to and subscribed before me this 18th day of December, A. D. 1891.

[L. S.] (Signed) CAS. H. SHIELDS, *Not. Pub.*

Order.

Considering the bill and exhibits, let the defendant show cause, on Saturday, January 9, 1892, at 11 o'clock a. m., why an injunction *pendente lite* should not be granted as prayed for, and, in the meantime, let a restraining order issue restraining the defendant, according to the prayer of the bill, until the hearing of the motion for an injunction.

(Signed) EDWARD C. BILLINGS, *Judge.*

New Orleans, Dec. 18, 1891.

Restraining Order. Issued December 18, 1891.

UNITED STATES OF AMERICA:

Circuit Court of the United States, Fifth Judicial Circuit and Eastern District of Louisiana.

CITY OF NEW ORLEANS
vs.
R. B. PAINE, U. S. Deputy Surveyor. } No. 12039.

The President of the United States to Ruffin B. Paine, deputy of Charles B. Wilson, surveyor general of the United States for the State of Louisiana, Greeting:

Whereas it has been represented unto us in our said circuit court on the part of the city of New Orleans in a bill in equity
13 lately exhibited against you touching certain matters and things therein set forth; and whereas the Honorable Edward C. Billings, one of the judges of our said court, upon due consideration thereof, has made and allowed an order in said cause whereby you are required to show cause on the 9th day of January, 1892, at 11 o'clock a. m., why an injunction should not issue as prayed for in said bill of complaint; and whereas the said judge has

granted and allowed an order restraining you immediately and forthwith and during the pendency of said motion for an injunction to the full extent and effect as prayed for in said bill of complaint:

Now, therefore, in consideration of the premises and of the allegations in said bill contained, you, the said Ruffin B. Paine, deputy of Charles B. Wilson, surveyor general of the United States for the State — Louisiana, your agents, attorneys, and servants, and each of you, are hereby commanded and strictly enjoined under the penalty of the law that you and each of you absolutely refrain and desist from surveying and locating the new back line or rear boundary of the French grant made to Pierre Delille Dupard or Duparc, as authorized and required to do by your special instructions issued to you on the 5th June, 1891, by the said surveyor general, and also from surveying as public lands and dividing the same into sections and other divisions and subdivisions, under the land system of the United States, any of the lands of The City of New Orleans, complainant, situated north of and contiguous to said new back line and described on the said Exhibit "A" by the letters S, B, R, and M.

And that you, the said Ruffin B. Paine, deputy of Chas. B. Wilson, surveyor general of the U. S. for the State of Louisiana, your agents, attorneys, and servants, and each of you, remain so inhibited and restrained until the further order of our said court in the premises.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this 18th day of December, in the year of our Lord one thousand eight hundred and ninety-one.

[L. S.] (Signed) E. R. HUNT, *Clerk.*

Marshal's Return.

Received by U. S. marshal, New Orleans, La., Dec. 18, 1891, and on the same day, month, and year I served copy of the within order on Mr. R. B. Paine, d'y U. S. surveyor, in person, by leaving said copy in his hands in the city of New Orleans, La.

(Signed) J. B. DONNALLY,
U. S. Marshal,
By T. J. GALBRETH,
D'y U. S. Marshal.

Subpœna in Chancery. Issued December 18, 1891.

UNITED STATES OF AMERICA:

The President of the United States to the marshal for the eastern district of Louisiana, Greeting:

You are hereby commanded to summon Ruffin B. Paine, United States deputy surveyor, to appear before the honorable the judges of the fifth judicial circuit of the United States of America at a circuit court to be holden on the first Monday of February, 1892,

then and there to answer a bill in chancery filed against him, wherein The City of New Orleans is complainant and said Ruffin B. Paine, U. S. deputy surveyor, is defendant.

Herein fail not, and have you then and there this writ, with your endorsement thereon how you have executed the same.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States of America, this 18th day of December, in the year of our Lord one thousand eight hundred and ninety-one, and the 116 year of American Independence.

(Signed) E. R. HUNT, *Clerk.*

14 The defendant is hereby notified that he is required to enter his appearance in the clerk's office of the United States circuit court on or before the first Monday of February, 1892; otherwise the bill may be taken *pro confesso.*

(Signed) E. R. HUNT, *Clerk.*

Marshal's Return.

Received by U. S. marshal, New Orleans, La., Dec., 1891, and on the same day, month, and year I served copy of the within subpœna on Mr. R. B. Paine, d'y U. S. surveyor, in person, by leaving said copy in his hands in the city of New Orleans, La.

(Signed) J. B. DONNALLY,
U. S. Marshal,
By T. J. GALBRETH,
D'y U. S. Marshal.

Demurrer. Filed January 9, 1892.

CITY OF NEW ORLEANS
vs.
R. B. PAYNE, U. S. D'y Surveyor. } No. 12039. In Chancery.

The demurrer of R. B. Payne, U. S. deputy surveyor, defendant, to the bill of complaint of The City of New Orleans, complainant.

This defendant, by protestation, not confessing all or any of the matters and things in the said complainant's bill contained to be true in such manner and form as the same are therein set forth, do demur to said bill, and for cause of demurrer show- that complainant has not by its said bill made such a case as entitles it to the relief prayed as to the matters contained in the said bill or any of such matters.

Wherefore, and for divers other good causes of demurrer appearing in said bill, this defendant does demur thereto, and he prays the judgment of this honorable court whether he shall be compelled to make any further or other answer to said bill, and he humbly prays to be hence dismissed with his reasonable costs in this behalf sustained.

(Signed) WM. GRANT,
U. S. Att'y & Sol. for Def't.

I hereby certify that in my opinion the foregoing demurrer is well founded in point of law.

(Signed) WM. GRANT, *Of Counsel.*

In the above-entitled case the affidavit in support of the demurrer is hereby waived.

(Signed) J. L. BRADFORD,
Counsel for Pl'tf.

Endorsed: The complainant sets down for argument the defendant's demurrer. (Signed) J. L. Bradford, for pl't'ff.

Notice: Demurrer Filed.

Extract from the Chancery Order Book.

SATURDAY, *January* 9, 1892.

CITY OF N. O.
vs.
R. B. PAINE. } No. 12039.

The defendant herein, through Wm. Grant, U. S. attorney, has this day filed a demurrer to the bill of complaint in this cause.

15 *Order: Continuance.*

Extract from the Minute Book, November Term, 1891.

NEW ORLEANS, SATURDAY, *January* 9, 1892.

Court met pursuant to adjournment.

Present: Hon. Edward C. Billings, district judge.

THE CITY OF NEW ORLEANS
vs.
RUFFIN B. PAINE, U. S. Deputy Surveyor. } No. 12039.

On joint motion of J. L. Bradford, solicitor for the complainant, and Wm. Grant, U. S. attorney for defendant, it is ordered that the application for an injunction herein and the demurrer go over to Tuesday, January 12th, 1892, at 11 a. m.

Continuance.

Extract from the Minutes.

TUESDAY, *January* 12, 1892.

CITY OF NEW ORLEANS
vs.
R. B. PAYNE. } No. 12039.

On motion of William Grant, United States attorney for the defendant, suggesting the illness of complainant's counsel—

It is ordered that this cause be continued to Tuesday, January 19, 1892, at 11 a. m.

Continuance.

Extract from the Minutes.

TUESDAY, *January* 19, 1892.

CITY OF N. O.
vs.
R. B. PAINE, U. S. D'y Surveyor. } No. 12039.

On motion of Wm. Grant, U. S. attorney, it is ordered that this cause be continued until to-morrow at 11 a. m., owing to the absence of complainant's solicitor.

Hearing, Evidence, and Continuance.

Extract from the Minutes.

WEDNESDAY, *January* 20, 1892.

CITY OF NEW ORLEANS
vs.
R. B. PAINE, U. S. Deputy Surveyor. } No. 12039.

This cause came on this day to be heard on the motion of complainant for an injunction *pendente lite* and on demurrer of defendant—present, J. L. Bradford, solicitor for complainant; William Grant, U. S. attorney for defendant—and complainant offered evidence in support of its motion, and defendant offered evidence *contra;* and thereupon the cause was argued in part by counsel for complainant and continued until to-morrow at 11 a. m.

Complainant's Evidence Offered on Application for Injunction.

Plan marked "Exhibit A" filed with bill.

The original made part of this transcript as per agreement of Feb'y 13, 1892, page 89.

16 EXHIBIT "B."

Decision of L. Q. C. Lamar, Secretary of the Interior, of Jan'y 6, 1888, Filed with Bill.

STATE OF LOUISIANA
vs.
JOHN MCDONOGH & CO. *et al.* }

Secretary Lamar to Acting Commissioner Stockslager, Jan. 6, 1888.

This case comes before the department upon the appeal of the State of Louisiana from the decision of the Assistant Commissioner of the General Land Office of May 17, 1887, involving the proper location and survey of the private land claims of John McDonogh

and Company and Henry Fontenot, eastern district New Orleans, Louisiana.

In 1882 so much of a subdivision survey of T. 10 S., R. 5 E., southeastern district (east of river), as lies south of the line of the old claimed limits of the William Conway portion of the Houmas grant and east of the claimed line of John McDonogh and Company, as surveyed by Deputy Surveyor John Kap, was ordered to be cancelled upon the ground that it was within the limits of the private land claim of John McDonogh and Company, which was confirmed by the act of Congress approved May 11, 1820.

Your predecessor thereupon cancelled certain swamp-land selections lying within said limits, from which action the State appealed.

Considering this appeal, my predecessor, on November 21, 1883 (2 L. D., 646), affirmed the action of your office cancelling said selections solely upon the ground that no selections of lands within said claimed limits should be allowed until the question of the boundaries and extent of the grant has been the subject of adjudication by the department.

The question as to the boundaries or extent of the grant was not considered by Secretary Teller in said decision, but, on the contrary, he said:

"I am advised that there has never been a survey of the McDonogh claim as an entirety by the United States surveyor general, and until that is done or the question of the boundaries of the grant presented in some other proper manner it seems to me it cannot properly be considered by this department. * * * I am not, however, prepared to say that I acquiesce in the opinion which you seem to express in your letter of January 15, 1883, to the effect that the tracts in question were confirmed to McDonogh and Co. as part of their claim under the act of May 11, 1820. That depends upon the extent of the grant. I do not undertake now to decide whether the grant, as described in the claim presented to the register and receiver (greatly extending the depth beyond that as presented to the old board), considered in connection with the report and the act of May 11, was confirmed or acknowledged, so that no 'claim on the part of the United States' can be made against it to the whole extent of a 'depth extending as far as Lake Maurepas.'"

Subsequently the surveyor general of Louisiana was instructed to order an investigation to determine the true and lawful mode for completing the surveys of said claims and of fixing their limits and quantities, so as to enable the surveyor general to finally locate and survey said claims according to law.

Upon said investigation the surveyor general, assuming that the Secretary of the Interior, by his decision of November 21, 1883, had recognized the Fontenot claim as technically confirmed with depth to Lake Maurepas by the act of February 28, 1823 (3 Stat., 727), and that the claim of McDonogh and Company was at least recognized, if not technically confirmed, by the act of May 11, 1820 (3 Stat., 573), decided that it was unnecessary to pass upon issues already clearly settled by the Secretary of the Interior, and held

that the only questions remaining for his consideration were—

17 1. Shall the survey of the claim of Fontenot preserving its front on the Mississippi river as section 44, in T. 11 S., R. 5 E. (see doc. 62 of the record), be completed by the extension of its side lines to the lake in the courses heretofore given them by the existing surveys, or shall those side lines be extended as parallel lines?

2. Shall the survey of the claim of McDonogh preserving, in like manner, its present front on the river as secs. 41, 42, and 43 of T. 11 S., R. 5 E., be completed by the extension of its side lines to the lake and Amite river in the courses heretofore given them by existing surveys, or shall its side lines also be extended as parallel lines and to what depth?

The surveyor general in his opinion says that the surveys above referred to were made under the rule that has obtained in the survey of riparian grants in Louisiana, to wit, that of divergency or convergency of the side lines at right angles to the general course of the bank from their points of departure; that "convergency, divergency, or parallelism of side lines resulted from the application of this rule to particular parts of the water front. If that were a straight line for any considerable distance parallelism resulted. If it were at the outside or convex side of a bend divergency resulted, as in the grant to Dupard at the bend of the river. If at a point on the concave side of the river, then convergency resulted."

Adhering to this rule, the surveyor general rejected the theory of parallelism with respect to the course of the lines as contended for by the State and decided that the survey of the McDonogh and Fontenot claims should be completed according to the rule above set forth.

The report of said investigation and the decision of the surveyor general therein coming before your office for consideration, you say:

"Upon the same basis of divergency the upper line of the McDonogh claim was extended by Deputy Surveyor John Kap to its intersection with the Amite river in the year 1881, and your predecessor, after a careful examination of all the facts connected with the case and an able report thereupon, concludes that the lower lines of McDonogh and Fontenot should be continued from the south side of Blind river, in township 9 S., R. 6 E., to the lake and Amite river and there connect with the transverse of those water boundaries, thus finishing the field-work necessary to the proper location of the claim."

After a careful investigation of the case I find nothing which would justify a different conclusion, and, if this decision becomes final, you will proceed to execute the survey as directed.

From this decision the State appealed upon the following grounds:

The Commissioner erred in finding that John McDonogh & Co. had a complete claim under Pierre Delille Dupard to the whole amount now claimed extending back in diverging lines to the Amite river.

The Commissioner failed to consider the newly discovered evidence found in his office showing the survey of two of the heirs of

Dupard to John McDonogh, Jr., restricting the grant to eighty arpens in depth.

The Commissioner erred in holding that the description giving the boundary of the claim as Lake Maurepas meant the Amite river.

The Commissioner erred in finding that at an early date Dupard or his heirs claimed even to Lake Maurepas.

No question seems to be raised by the appeal of the State as to the correctness of your decision holding that the survey should be made according to the rule of divergency of side lines at right
18 angles from the general course of the river so far as it affects the survey of the claim to the depth of eighty arpens, although it is contended by counsel for the State in their argument that, the grant being for a certain front and depth and it not being specified that the lines are to open and close in any manner, it must be located by parallel lines.

In support of this rule they rely upon the decision of the supreme court of Louisiana in Millaudon *v.* McDonogh (18 La., 103), which held that "the grantee or purchaser cannot claim by diverging lines to the rear, and thereby obtain more than the superficies contained in a parallelogram, unless there be somet-ing in the grant to authorize the opening, or from the peculiar position of the claim it shall be necessary to give the superficial quantity."

This case was taken to the Supreme Court of the United States by writ of error and dismissed by that court upon the ground that it had no jurisdiction in the case, and hence the court did not pretend to pass upon the question as to the proper manner of locating the side lines of this grant. (3 How., 693.)

The decision of the supreme court of Louisiana in the case of Milloudon *v.* McDonogh is not binding upon the department as to the proper location of this grant, nor has the department ever recognized as authority the ruling therein made.

As early as 1830, ten years prior to the decision above referred to, Deputy Surveyors A. H. Foster and Thomas P. Evans, in the survey of T. 11 S., R. 5 E., and T. 10 S., R. 5 E., respectively located the front and side lines of this grant to the extent of ten or twelve miles in depth, recognizing the divergency of the side lines substantially contended for.

Surveys of townships, being partly within the claimed limits of this grant, were made from time to time after said decision was rendered, relocating and extending these lines, in all of which the principle of divergency was recognized and acted upon.

The Supreme Court, in the case of The United States *v.* McMasters (4 Wall., 682), speaking of the Bachemin grant, said—

That grant fronted on a bend of the river, on the convex side or shore, and according to the usage in Spanish locations on such bends, and which is the usage and practice of locations under our system of survey, the side lines were at right angles with the bend of the river, and, as in the instance before us, diverge and widen as the lines extend for the entire depth of the front lot.

This rule was also recognized by the Supreme Court in the case of Slidell *v.* Grandjean (111 U. S., 412).

Concurring in your opinion that the front side lines of this grant have been properly located, as shown by the official plats of survey on file, upon the basis of divergency recognized by the surveyor generals for more than half a century, the only question remaining is, To what depths shall these lines be extended?

The cities of Baltimore and New Orleans claim under the will of McDonogh, whose title is derived from a French grant made April 3, 1769, to Delille Dupard of a tract of land having "30 arpens of front to the river, upon the whole depth which shall be found unto Lake Maurepas."

The front of the grant was increased to forty arpens, which is accounted for by the action of the river increasing the arc of the bank.

About the year 1784 a partition was made of this land between the heirs of Dupard, five in number.

At the date of the acquisition of Louisiana by the United States the several interests in this grant were owned by the following persons respectively and in the order named, counting from the upper part down the stream:

1. Antoine Tregre, four arpens front.

2. L. H. Guerlain, agent for the Eastern Shore of Maryland Louisiana Company, ten arpens seven toises front.

3. John McDonogh, Jr., and Shepard Brown, partners, who purchased from Pedro Le Bourgeois eighteen arpens three toises and three feet.

19 4. Henry Fontenot, eight arpens four toises and three feet.

Each of these claimants except Fontenot presented his claim to the old board of commissioners, claiming the following depths respectively:

Tregre claimed "40 arpens in depth;" Guerlain "a depth extending back to Lake Maurepas," and McDonogh and Brown eighty arpens in depth, with side lines opening toward the rear.

The board confirmed the claims as follows:

1. To Antoine Tregre, four by forty arpens, the full amount claimed.

2. To L. H. Guerlain, ten arpens seven toises by forty arpens, rejecting the claim for a depth to the lake.

3. To John McDonogh, Jr., and Shepard Brown, sixteen arpens eight toises and three feet by eighty arpens, and one arpen twenty-five feet front by forty arpens.

Subsequently McDonogh and Co. became the owners of the whole of the Dupard grant, except the eight arpens four toises and three feet owned by Fontenot, and under the act of February 27, 1813, they filed their claim before the register and receiver at New Orleans with additional evidence, claiming a front of 32 arpens, "with a depth extending as far as Lake Maurepas."

The register and receiver acting upon this claim reported it to the senate January 20, 1817, as follows:

"First class, species first:

"John McDonogh, Jr., & Co. claim a tract of land situated in the county of Acadia, on the east shore of the Mississippi, sixteen leagues above New Orleans, containing thirty-two arpens front, with a depth extending as far as Lake Maurepas. This tract of land has formerly been claimed before the board of commissioners, and the depth extending beyond forty acres rejected by them for want of evidence of title, but the claimant has since produced a complete French title for the whole quantity claimed in favor of Delille Dupard (under whom he claims), dated the 3d of April, 1769. (American State Papers, Duff Green ed., vol. 3, 223.)"

The register and receiver reported this claim as belonging to the first species of the first class, which are—

Claims founded on complete titles granted by the French or Spanish governments.

And added:

"Those claims which are found under species first of the first class, being founded on complete grants of former governments, we think are good in themselves on general principles, and therefore require no confirmation by the Government of the United States to give them validity."

By section first of the act of Congress of May 11, 1820, it was enacted—

"That the claims for lands within the eastern district of the State of Louisiana, described by the register and receiver of the said district in their report to the Commissioner of the General Land Office bearing date the 20th day of November, 1816, and recommended in the said report for confirmation, be, and the same are hereby, confirmed against any claim on the part of the United States."

With their last application McDonogh & Co. filed a plat of the survey of said claim made by F. B. Potier, a United States surveyor, which gives the boundaries of the claim substantially the same as now claimed by appellees, to wit, by diverging lines extending to the Amite river.

It is claimed by the appellees that this plat was presented for the action of the Commissioners in support of their claim, and that as the claim was confirmed it must necessarily be to the extent described in the plat.

20 There is no evidence that this survey was made under any authority from the Government or approved by the surveyor general or made under the legal sanction of any one authorized to act in the premises, nor does it appear that the register and receiver or Congress acted upon this survey in recognizing this claim as a claim founded on a complete title needing no confirmation. As said by the Supreme Court in the case of Millaudon *v.* McDonogh—

"There can be no doubt such plans and descriptions were filed and recorded in due time, but no evidence is found in the record that the register and receiver acted on them or that they were presented to Congress even as documents accompanying the report. If they were it is manifest that they were disregarded for two reasons: First, because Congress did not assume the power to deal directly with this title at all, and, secondly, because the report had reference

singly to the face of the grant, regardless of private surveys made subsequent to its date at the instance of the successive owners."

By the act of May 11, 1820, Congress acknowledged and recognized the grants which the register and receiver reported and declared to be founded on complete titles to be valid and complete against the United States and any one claiming under them, but, as said by the Supreme Court in the case of Millaudon *v.* McDonogh (*supra*), "the recognition extended only to the boundaries the grants themselves furnished, according to their landmarks and true constructions of the local laws."

The extent of the claim of McDonogh must, therefore, be determined by the extent of the grant to Dupard and should not be limited by the depth confirmed to McDonogh under his first application, claiming under the grant to Le Bourgeois, or of the depth confirmed to the kindred claims, of which McDonogh subsequently became owner. The admission of the several claimants in their petition for confirmation as to the depths and extent of their claims does not conclude the heirs of McDonogh from showing depth to a greater extent under the act of May 11, 1820, recognizing a complete and valid title in McDonogh & Co. to all the land granted to Dupard by the French grant of April 3, 1769.

The grant to Dupard is for "30 arpens of front to the river, upon the whole depth which shall be found unto Lake Maurepas, where heretofore were two villages of the Collapissa savages."

The claim of McDonogh & Co., as presented in their second application before the register and receiver, was for "a depth extending as far as Lake Maurepas."

Presuming that the side lines of the grant have been correctly located with reference to their degree of divergency, it is then certain that no part of the McDonogh claim will touch Lake Maurepas, and it is uncertain whether the lower line of the Fontenot claim, which is the lower line of the Dupard grant, will touch any part of the lake, but if it touches the lake at all it will be at a point on the western shore of the lake near the Amite river.

The lower line of the grant run by Potier, as projected on the corrected plats in the surveyor general's office, does not touch the lake at any point, and the maps furnished by the surveyor in response to the letter of the Commissioner of the General Land Office of July 27, 1866, show that the lower line of the Fontenot claim projected by calculation and protraction to pass along the western shore of the lake near the mouth of the Amite river, and that no part of the lake is in the rear of any part of the grant, but to the east of it.

The decision of your office assumes that at the date of the grant the lake extended along the rear of the grant, and that it has receded or been filled in by crevasse deposits until the lake is now to the east and on the lower boundary line of the grant. Upon this theory you hold that the lines should be extended over all the land thus formed by the receding of the lake—from its eastern boundary—and direct that the lower lines of the Fontenot and McDonogh claims should be extended to the Amite river.

While this theory may possibly be correct, I do not think there is sufficient evidence in the record to warrant the conclusion. It is purely speculative, and, as the call for a depth as far back as the lake may be made certain without resorting to it, I am not inclined to adopt it.

21 Lake Maurepas was not named as a boundary of the grant, but simply as a point to measure the depth of the grant, and hence the land formed by accretion does not inure to the claimants under the grant. The grant did not pretend to convey to claimants in terms all the lands bordering on Lake Maurepas within the side boundaries, but only to grant thirty arpens front on the river and of such a depth as may be found unto Lake Maurepas.

The boundary of the lake might be of different depths from the front, as, for instance, it might be of a certain distance from the front in the center of the grant and double that distance from the front at the sides of the grant. If Lake Maurepas had been named as a boundary of the grant it would have conveyed all the land along the shore of the lake within the limits of the grant, and with it the riparian rights. But a grant of thirty arpens front with such depth "as shall be found unto Lake Maurepas" or "as far back as Lake Maurepas" would convey only such depth as may be found to the nearest point of the lake. Therefore the distance on a straight line through the center to a point corresponding with the nearest point of the lake would be the measure of the depth of the grant.

It is contended by counsel for the State that, as the call for the lake cannot be reached by extending the lines of the survey, rendering the identity of the grant uncertain, the grant is therefore void. I do not think the grant is uncertain by the reason of the fact that the lake cannot be found in the rear of the grant because, as before stated, the lake is not named as a boundary of the grant, but merely a point to designate the depth of the grant.

If the side lines of the grant are correctly located, and the western and southern shores of the lake are the same as they were when the grant was made, it shows that while Lake Maurepas is not immediately in the rear of the grant it nearly adjoins one side of it and is in the direction of the rear. Lake Maurepas is situate north of the river, while the grant runs from the river to the north in the general direction towards Lake Maurepas.

While the line as drawn through the grant from the front to the rear might not touch the lake, yet "the whole depth that shall be found unto Lake Maurepas" or a depth "as far as Lake Maurepas" can be ascertained by finding the corresponding depth—that is, a depth equal to or corresponding with the depth of Lake Maurepas from the river—and therefore the call for such depth may be made certain.

The depth of these grants is determined by a straight line drawn through the centre from the front to the rear, and by this rule a depth "as far as Lake Maurepas" can be ascertained.

In this case a line drawn through the centre of the grant from the front to the rear, terminating at the point of intersection of a line drawn at right angles thereto so as to touch the lowest point of the

southern shore of the lake, would seem to determine accurately a depth "as far back as Lake Maurepas." It seems to me that this is the only rule by which the depth of this grant can be ascertained in accordance with the terms of the grant. I am, therefore, of the opinion that the depth of this grant only extends as far back as the southern shore of Lake Maurepas, and that the side lines of the grant should not extend farther than that depth.

It is urged by counsel for appellees that the State is estopped from now claiming title to these lands because it was a party to a suit against the executors of John McDonogh, claiming these identical lands under the will of McDonogh.

By the will of McDonogh it was provided that if there should be a lapse of both the legacies to *to* the cities of Baltimore and New Orleans or either of them, wholly or in part, by refusal to accept or from any other cause, then "said legacies shall inure, as far as relates to the city of New Orleans, to the State of Louisiana and, as far as relates to the city of Baltimore, to the State of Maryland."

The States of Louisiana and Maryland brought suit to declare these bequests void and to declare the conditional bequests of the same property to them as then valid and in force.

In this suit the States of Maryland and Louisiana merely claimed to be proper representatives of whatever interests McDonogh attempted to bequeath to the cities of Baltimore and New
22 Orleans. The question as to the title to this land or as to the extent of the claim of McDonogh under the grant to Dupard was not in issue and had not been determined. I do not think that the State is estopped by that suit from denying that grant to Dupard extended to the Amite river, and the authorities cited do not sustain the position contended for by counsel.

Your decision is reversed and you will direct that the survey of these public lands be closed upon this grant in accordance with the rule above stated.

SURVEYOR GENERAL'S OFFICE,
NEW ORLEANS, LA., *December* 11, 1891.

This is to certify that the above and foregoing is a true and correct copy of the original on file in this office (consisting of twelve pages).

[L. S.] (Signed) CHAS. B. WILSON,
Surveyor General, La.

EXHIBIT "C."

Letter from Sur. Gen'l to R. B. Paine of Nov. 11, 1889. *Instructions for Surveying Houmas Lands. Filed with Bill.*

Department of the Interior, office of U. S. surveyor general, district of Louisiana; office, custom-house building.

NEW ORLEANS, *November* 11*th*, 1889.

Ruffin B. Paine, Esq., U. S. deputy surveyor, Anacoco, La.

SIR: The following instructions, additional and supplementary to the printed manual of instructions of May 3d, 1881, are prescribed

for your government in the execution of your work under your contract of this date for the survey and location of the private claims of John McDonogh, Jr., and Henry Fontenot and of the public lands in the rejected portion of the Houmas grant.

Claims of McDonogh and Fontenot.

The claims constitute the old French grant made to Pierre Delille Dupard, April 3d, 1769, the depth of which was adjusted in the decision of the department of the 6th January, 1888.

The upper side line of this grant, being the upper side line of John McDonogh & Co., R. & R., 1816, No. 406, was surveyed from the river to its intersection with the south boundary of T. 10 S., R. 5 E., in the years 1850 and '51 by A. W. Warren, dep. sur., and in 1880 John Kap, dep. sur., extended it to the Amite river.

These surveys will therefore stand as true locations of the upper line of the French grant and you will close the back line of said grant on the same.

The lower side line of the McDonogh and Fontenot claims (the latter line being the lower side line of the Dupard grant) was surveyed from the river back to the south boundary of T. 10 S., R. 6 E., in 1850, 1851, and 1855 by A. A. Warren, deputy surveyor, and by Geo. E. Brent, dep. surveyor, and those surveys will not be disturbed. But from that township line back to the rear
23 line of the French grant you will extend those lines in their respective courses, disregarding their supposed locations in 1830 by Thomas P. Evans, dep. sur., the same not being believed to have been actually made in the field, or, if so, believed to be erroneous and fraudulent. The back line of the claims of McDonogh and Fontenot, being the back line of the grant to Dupard as restricted in depth by the aforesaid decision, you will survey and locate in the following manner:

You will carefully examine the southern shore line of Lake Maurepas, and if entirely satisfied from reliable evidence, such as is contemplated under the head of "private land claim surveys," p. 111 of the printed manual, or from any other reliable proof and your own examinations that there has been a change in said shore line since the grant was made, viz., 1769, you will proceed under such proof and upon your own responsibility, as a sworn officer, to ascertain the position of such shore line in 1769 as near as may be.

And if it cannot be thus ascertained to your satisfaction where it was so far back as 1769 you will ascertain where it was at any time since then, if this can be done safely and satisfactorily.

If you find no reasons to think the shore has changed, or if the evidence resulting from your examinations and from the other evidence you may obtain is not satisfactory on this point or will not enable you to fix it in any other position than it now occupies, you will conclude that its position now marks its position in 1769, when the grant was made.

Having thus satisfied yourself as to the true southern shore line of the lake at the date of the grant, you will run a blank compass

line without marking or measuring the same from the most southern point of such shore line so ascertained in a west course to the lower side line of the Fontenot claim heretofore directed to be extended from the south line of T. 10 S., R. 6 E. You will at such point of intersection establish the lower back corner of the grant and of the Fontenot claim.

From that point you will prolong the line west, marking and measuring the same, to the upper side line of McDonogh as surveyed by John Kap, establishing a corner at the intersection of the lower side line of that claim and taking connections with all township and section lines and establishing corners at such intersections.

You will also complete the survey of the McDonogh claim, R. & R., 1816, No. 406, as confirmed by the act of 11th May, 1820, by surveying the 80-arpen back line, and balance of the claim of John McDonogh & Shepherd Brown, old board eastern district, No. 368. (See Am. State Papers, vol. 2, p. 332, Gales and Seaton's ed.) This latter claim was by that board confirmed for a front of 18 arps. 3 toises and 3 ft. by 40 arps. and a second depth on that front of 16 arpens 8 toises and 3 ft., but has never been surveyed or located.

You will resurvey and relocate the south line of the Houmas grant in its extension through T. 10 S., R. 6 E., taking connections with the lines of the Fontenot claim (should it intersect the same) and all section lines, establishing corners at such points of intersection.

This line of the Houmas grant, having been eliminated from the public surveys by the decision of the Supreme Court in the Houmas cases (see 111 U. S. Reports, p. 412), is no longer a boundary line of an existing private land claim beyond the depth of 80 arpens from the Mississippi river, yet, as the adjustment of the swamp-land grant and probably homestead and pre-emption entries under the laws of the U. S. may depend in future upon it and require that all surveys shall be connected with it, you will, therefore, in your subdivisional work in T. 10 S., R. 6 E., and also in T. 10, R. 4, re-establish the same where necessary and connect with it all other lines of public lands or private claims.

Township 10 S., R. 6 E.

After the survey of the McDonogh and Fontenot claims and the back lines thereof and the re-establishment of the Houmas boundary in T. 10 S., R. 6 E., you will survey the residue of the township as public land, re-establishing the old work of Evans in 1830, if the same can be found and identified, otherwise doing the work as an original survey and as the surveying manual directs.

24 T. 10 S., R. 4 E.

This township has never been sectionized. You will subdivide it in conformity to the printed manual, connecting with the line of the Houmas grant, after re-establishing the same, if necessary, and establishing corners on the same. You will start from and close upon the boundaries of this township heretofore surveyed, if the same can be found and identified by you.

If not, you will resurvey such of those boundaries as are absolutely necessary to furnish you starting and closing points.

The same rules will guide you in your work in T. 10, R. 6 E.; t'p's 8 S., R's 1 & 2 E.; 9 S., R's 1, 2, & 3 E., & 10 S., R's 2 & 3 E.

Under his contract of March 3d, 1881, Geo. H. Grandjean, dep. sur., was proceeding in 1881 to survey the back line of the Houmas grant at 42 arpens from the Mississippi river in T. 10 & 11 S., R. 3 E., and to lay off the land back of such line in T. 10, R. 3, as public land, when he was enjoined from further proceedings in one of the Houmas suits, which was subsequently decided by the Supreme Court, in 1884, in the cases heretofore referred to. As the court then fixed the true back line of that celebrated grant at the distance of 80 arpens from the river, it results that all the field-work of Mr. Grandjean found between that line (after you shall have surveyed the same) and the river will be disregarded by you. The remainder of his field-work you will, if found correct, continue and complete, so as to finish the subdivision of the t'p, extending his lines to and closing them upon the back line of the claim as surveyed by you. Such back line will be run by you parallel with and 80 arpens from the river as it existed in the year 1777, the date of the grant of the additional 40 arpens of the Houmas grant (as construed by the court). In ascertaining if any changes have occurred in the bank of the river within that time, and, if so, their extent, you will be governed generally by the instructions as to the south shore of Lake Maurepas and those contained on p. 111 of the surveying manual.

If you are not well satisfied that material changes have taken place, you will proceed upon the assumption that the river runs now as it did then, and locate the back line accordingly; such back line will be continued into T. 10, R. 2, until it intersects the back line of the private claims in that township fronting on the river.

You will then subdivide the residue of that township back of such line and of the claims fronting on the river as public lands, and in the usual mode.

You will resurvey only such portions of the upper side line of the Houmas grant as have heretofore been surveyed, but it will not be necessary to originally survey any portions thereof lying within the limits of other private claims.

You will resurvey T. 8 S., R. 1 & 2 E., & T. 9 S., R. 1, 2, & 3 E., in strict accordance with the old surveys, where the same can be safely identified by you, taking care not to extend your field operations in any of these townships or in T. 10, R. 2, outside of the old line of the Houmas claim, except where, according to the established usage of the surveying service, it is necessary to do so in order to complete the survey of claims or sections part of which may lie within and part without said claim.

In this portion of your work you will resurvey the private claims in strict conformity with the old lines and corners, if they can be identified; otherwise according to the confirmations.

In your work in T. 9 & 10, R. 3, you will re-establish the old lines

separating the Daniel Clark division of the Houmas grant from the other two divisions, carefully connecting them with all lines of the public surveys or private claims and with the 80 arpens back line of the Houmas grant, which you are to survey originally.

And in all the surveys under your contract you will meander such streams and lakes as have heretofore been meandered and such other streams, lakes, and water-courses, &c., only as are required to be meandered by the surveying manual.

In cases where you are in doubt what course to pursue in your field-work you will ask further instructions from this office. There will be no objection to you making returns, if the same be in every way complete in themselves, of one or more townships as you progress and to your receiving pay for the same if the work be approved.

25 But no returns will be thus received or acted upon unless all the work in such township or townships shall appear to have been completed as required by your contract and instructions, leaving nothing else to be done or changed within the same.

You will duly compare your instruments with the standards and adjust the same, if necessary, submitting the same to this office for examination and approval.

And you will keep them so adjusted during the continuance of your field operations.

And as the body of your work is in a very low region where you will be *be* much impeded by rain and the usual bad weather of the winter season, you are advised to avail yourself of the present dry condition of the swamps by beginning your work as soon as possible after you may be advised of the approval of your contract.

The great necessity for the early completion of your work in the adjustment of the important and varied interests depending in one way or another upon the long-pending claims involved in it, I trust will induce you to carry it on with all practicable speed.

In order that the topography and other data required to be shown may be more correctly located on the plats, you will omit the noting of the topograph on random lines as prescribed by the printed instruction of May 3d, 1881.

Such measurements must now be given on the return or true lines as per instructions from the Hon. Commissioner of the General Land Office dated June 2, 1883.

Very respt.,

(Signed) CALHOUN FLUKER,
Surveyor General, La.

EXHIBIT "D."

Sur. Gen'l to R. B. Paine, Dep. Sur., of Feb'y 24, 1890, Supplemental Special Instructions for Survey of Back Line of Dupard Grant. Filed with this Bill.

SURVEYOR GENERAL'S OFFICE,
NEW ORLEANS, LA., *Febr'y 24th*, 1890.

Ruffin B. Paine, Esq., U. S. deputy surveyor, Anacoco, La.

SIR: Your contract of Nov. 11th last, with a copy of special instructions of same date for your field-work thereunder, were submitted to the Commissioner of the General Land Office for approval and were by him submitted to the Secretary of the Interior for his approval or disapproval of the specific directions for the running of the back line of the French grant made to Dupard in 1769, now embraced in the claims of Henry Fontenot, No. 57, 1st class, register eastern district, 6 Jan'y, 1821, and John McDonogh & Co., R. & R., 1816, No. 406.

The Secretary having held, as I am now advised by the Commissioner, that such back line should not run west from the southern extremity of Lake Maurepas, but should run therefrom on such a course as will be perpendicular to the axis of the Dupard grant, your former instructions are modified as follows:

Having satisfied yourself of the true position of the lake as directed in your former instructions, you will run the back line therefrom on a compass direction which will be at right angles to a line which would run through the centre of the French grant, but this centre line or axis of the grant need not itself be run on the ground. Its course will be a mean between the courses of the upper and lower side lines of the grant, as heretofore established, and to be established by you as heretofore directed.

In running such back line you will mark it, establish corners on it, and take connections of other lines it may intersect, as heretofore instructed, in every respect as though no other change had been made in your former instructions, except as to the course of the same.

26 In addition to your special instructions for T. 10 S, R's 2 & 3 E., you are now instructed to resurvey and re-establish the league and a half line as surveyed originally in 1830. George H. Grandjean, deputy surveyor, re-established said line in T. 10 S., R's 3 & 4 E., to the extent of his field operations therein, and you will continue his work if you find it correct and re-establish the remainder of such line in T. 10, R. 3 E., and also in frac'l T. 10, R. 2; but if it was never originally surveyed and established in the frac'l t'p you will not attempt to re-establish it or to originally run it therein.

Very respectfully,

(Signed) CALHOUN FLUKER,
Surveyor General, La.

SURVEYOR GENERAL'S OFFICE,
NEW ORLEANS, LA., *December* 11, 1891.

This is to certify the above and foregoing to be a true and correct copy of the original on file and of record in this office (consisting of one and one-half pages).

[L. S.] (Signed) CHAS. B. WILSON,
Surveyor General, La.

EXHIBIT "E."

Com'r of Gen'l Land Office to Sur. Gen'l La. of March 4, 1890, *Approving Contract with R. B. Paine, Dep. Sur., of Nov.* 11, 1889, *and Special Instructions Thereunder, etc. Filed with Bill.*

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
WASHINGTON, D. C., *March* 4, 1890.

Calhoun Fluker, Esq., U. S. surveyor general, New Orleans, La.

SIR: Referring to your letter dated November 11, 1889, transmitting contract and bond No. 1 (in duplicate), dated November 11, 1889, awarded to Ruffin B. Paine, U. S. deputy surveyor, for the survey of the McDonogh & Fontenot claims and for surveys necessary to carry into effect the decision of the Supreme Court of the United States, the provisions of the act of Congress approved March 2, 1889, and the directions of the Secretary of the Interior under date of September 27, 1889, you are advised as follows:

The forms of said contract and bond, as submitted, are found to have been executed in a due and legal manner.

The duplicate special instructions dated November 11, 1889, issued to the deputy for the execution of said contract as amended by the supplemental special instructions of February 24, 1890, are found to be satisfactory.

I have, accordingly, this day approved contract and bond No. 1 (in duplicate), awarded to Ruffin B. Paine, U. S. deputy surveyor, for the surveys therein provided for; liability, $7,500, payable from the appropriation (approved March 2, 1889) for the survey of the public lands for the current fiscal year.

As no apportionment out of the stated appropriation has heretofore been made to the district of Louisiana, the sum of $7,500 chargeable to said appropriation, to cover the liability of said contract, is hereby apportioned to your district.

Very respectfully,
(Signed) LEWIS A. GROFF,
Commissioner.

SURVEYOR GENERAL'S OFFICE, DISTRICT OF LOUISIANA.

I do hereby certify the above and foregoing two pages and this page contains and is a true copy of the original on file and of record in my office.

Witness my hand and seal officially, at New Orleans, this 15th day of December, A. D. 1891.

[L. S.] (Signed) CHAS. B. WILSON,
Surveyor General U. S.

27 EXHIBIT "F."

Plan certified by surveyor general of La. on 4th June, 1891. Original made part of this transcript as per agreement of Feb'y 13, 1892.

EXHIBIT "G."

Extract from Field-Notes of R. B. Paine, Dep. Sur., in Survey of Back Line of French Grant to Dupard. Filed with Bill.

T. 10 S., R. 6 E.

General Description.

* * * Before locating the back line of the French grant to Dupard of 1769, now the claims of John McDonogh, Jr., & Co., R. & R., No. 406, and Henry Fontenot, register's report No. 57, under the terms of the special instructions issued to me, I satisfied myself that the southern shore line of Lake Maurepas has, for an indefinite time, been a moving line, slowly extending itself south and southwest. This part of the lake is in marked contrast with the northern and eastern and most of the western shore. It is very shallow, and along it the cypress trees grow out in the water from a quarter to a half mile from the present shore line, and stumps, logs, and remains of former forest growths extend out even further, making the navigation at low tide dangerous for skiffs and sail-boats. I explored the whole lake by boat and examined its depths, channels, and shores and found several live trees still growing out in the lake as far as two miles from the present shore line of secs. 12 & 13.

There are also a few trees or, rather, bushes growing out about the same distance from the shore line of secs. 17 and 18, in T. 10 S., R. 7 E. I took the affidavits on this subject of all the old and reliable settlers I could readily find, viz., John K. Frolich, Arthur Cornet, Gustave Cambre, Henry Nickens, and Zeno Barthelotte, which are made a part of my returns, and, so far as they describe the present condition of things, I agree with their statements. As to their estimates of where the shore line was in 1769, or 121 years ago, I can form no definite conclusion. The only thing which seems certain is that it was a long way from where it now is, and in fixing upon the distance of 104.87 chains I have tried to adopt a location which would probably give the claims all the depth they are entitled to without extending them so far as some of the evidence would require. This latter remark refers to the old survey of T. 10 S., R. 6 E., by Thomas P. Evans, dep. sur., in 1830, which, if an honest survey, leaves no doubt that the back line of this grant

should be located at least two miles further north than I have located it; but I do not believe that it was ever an honest survey, although the map and notes seem to have been twice approved and to have been respected as the basis of U. S. sales, swamp-land approvals, and patents up to this time. Still, as it represents the whole northeast portion of the township as then land and not lake, I think that part of the survey partly erroneous or fraudulent.

It is scarcely credible that since that date all this land could have been covered by the lake. It is all now very shallow and, with the exception of the channel, which comes out of Blind river and sweeps around in a curve at a distance of half a mile out from the shore line of secs. 2 & 3, it is dotted over with logs stuck in the mud and a few growing trees, indicating that this is the shoalest part of the lake.

Blind river now enters the lake in sec. 3, and the north boundary of the township crosses at its mouth. It is a stream without current, excepting as affected by the tides and occasional crevasses in the levees of the Mississippi river. I see no reason to think this stream ever, especially so late as 1830, entered the lake further north than it now does. Hence, the survey of the north boundary of the t'p by Evans, and of the interior sec. lines, which fail to rep-
28 resent the mouth of this stream or rather bayou (which it really is), must be erroneous. It is true his survey, as will be seen by the map constructed from his notes, represents a large bayou crossing the north boundary about where Blind river now does, and extending southeasterly across the east boundary. This may have been then what, by crevasses and overflows, subsequently became Blind river as we now have it, while the washing in of the lake shore south and southwest may have placed the mouth of the river where it now is.

This is the only theory which will reconcile existing physical conditions with the old survey by Evans.

The course of the back line of the McDonogh & Fontenot claims required to be at right angles to the axis of the grant to Dupard, was found to be S. 84° 40′ W. at a var. of 6° 00′ E. The upper side line had been extended in 1881 by John Kap, dep. sur., on a course of N. 27° 48′ W., while I had extended the lower side line on a course of N. 17° 10′ E. The mean between those two courses is N. 5° 20′ W., and a line at right angles to it would be one running N. 84° 40′ E. or S. 84° 40′ W.; and this is the course adopted.

* * * * * * *

SURVEYOR GENERAL'S OFFICE, DISTRICT OF LOUISIANA.

I do hereby certify the above and foregoing to be a true and correct extract taken from the original, now on file and of record in my office, consisting of four and one-half pages.

Witness my hand and official seal, at New Orleans, La., this 11 day of December, A. D. 1891.

[L. S.] (Signed) CHAS. B. WILSON,
Surveyor General, La.

EXHIBIT "H."

Supplemental Decision of Ass't Secretary of the Interior of 14 *May*, 1891. *Filed with Bill.*

DEPARTMENT OF THE INTERIOR,
WASHINGTON, *May* 14, 1891.

The Commissioner of the General Land Office.

SIR: I am in receipt of your letter of March 20, 1891, calling attention to the decision of the department of January 6, 1888, in the case of The State of Louisiana *v.* John McDonogh *et al.* (6 L. D., 473), asking for a specific interpretation of said decision upon the following question: "Did the aforesaid decision fix absolutely the start- point for the determination of the back line of the McDonogh and Fontenot claims at the most southern point of Lake Maurepas, as it existed at the date of the decision?"

In the case above referred to the department held that the depth of this grant could be ascertained by finding a depth equal to or corresponding with the depth of Lake Maurepas from the river—that is, by drawing a line "through the centre of the grant from front to rear, terminating at the point of intersection of a line drawn at right angles thereto, so as to touch the lowest point of the southern shore of the lake."

I find nothing in this decision to indicate that it was the intention of the Secretary to authorize an investigation as to whether the shore of the lake had been changed since 1769, but, on the contrary, it seems to be clearly indicated that the southern shore of the lake as it now exists should be fixed absolutely as the starting point to determine the back line of said grant. You will instruct the surveyor general accordingly.

Herewith are returned the papers.

Very respectfully,

(Signed) GEO. CHANDLER,
Acting Secretary.

29 SURVEYOR GENERAL'S OFFICE,
NEW ORLEANS, LA., *December* 11, 1891.

This is to certify that the above and foregoing is a true and correct copy of a document attached to and forming part of a letter from the Hon. Commissioner of the General Land Office to the surveyor general of the district of Louisiana (consisting of 1½ pages).

[L. S.] (Signed) CHAS. B. WILSON,
Surveyor General, La.

EXHIBIT "I."

Letter from Comm'r Gen'l L. O. to Sur. Gen'l for La. of May 21, 1891, *Ordering New Survey of Back Line. Filed with Bill.*

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
WASHINGTON, D. C., *May* 21, 1891.

E 61257—1891.

The U. S. surveyor general, New Orleans, Louisiana.

SIR: I enclose herewith a copy of the departmental decision of the 14th instant, fixing definitely the starting point from Lake Maurepas for the determination of the back line of the McDonogh and Fontenot claims in Louisiana.

This line was run by Deputy Surveyor Ruffin B. Paine under his contract No. 1, dated November 11, 1889, under instructions of your predecessor, and was accepted by this office to the extent of payment for the work, it having been done in accordance with his instructions; but the plats were withheld from filing, awaiting the decision of the department as to the correctness of the instructions, in view of the original decision of the department in the case, dated January 6, 1888. (6 L. D., 473.)

It is unnecessary to enter into the details of the instruction issued by your predecessor or of the work performed by his deputy in pursuance thereof, as they form a part of the files of your office and you are no doubt familiar with them. It is sufficient to state that the enclosed decision directs that the southern shore of the lake as it now exists shall be fixed absolutely as the starting point to determine the back line of the aforesaid claims.

This necessitates the rejection of the survey executed by Paine as to the establishing of this line, and you will enter into a new contract with some competent deputy for its establishment, as now directed by the department.

The same rates will be allowed as in former survey and the same general instructions as set forth by your predecessor in the matter of closing the lines of public survey on this back line will be observed by you in your new instructions, differing only in such details as are made necessary by the circumstances of the case, the essential point being to start the back line of said claims from the southern shore of the lake as it "now exists."

You will, therefore, at your earliest convenience, prepare a contract and bond, with special instructions, for the execution of the work and forward the same to this office for examination and approval.

Very respectfully,
(Signed) WM. STONE,
Acting Commissioner.

SURVEYOR GENERAL'S OFFICE,
NEW ORLEANS, LA., *December* 11, 1891.

This is to certify that the above and foregoing is a true and correct copy of the original on file in this office, consisting of two pages.

[L. S.] (Signed) CHAS. B. WILSON,
Surveyor General, La.

30 EXHIBIT "J."

Contract, June 5th, 1891, *Ch's B. Wilson, U. S. Sur. Gen., Ruffin B. Paine, U. S. Dep. Sur. Approved July* 10, 1891. *Filed with Bill.*

This agreement, made this fifth day of June, 1891, between the surveyor general of the United States for Louisiana, acting for and in behalf of the United States, of the one part, and Ruffin B. Paine, deputy surveyor, of the other part, witnesseth—

That the said Ruffin B. Paine, for and in consideration of the conditions, terms, provisions and covenants hereinafter expressed, and according to the true intent and meaning thereof, doth hereby covenant and agree with the said surveyor general, in his capacity aforesaid, that he the said Ruffin B. Paine, in his own proper person, with the assistance of such chainmen, axmen, flag-bearers and moundmen as may be necessary, in strict conformity with the laws of the United States, the printed manual of surveying instructions, and other surveying instructions issued by the Commissioner of the General Land Office, and with such special instructions as he may receive from the said surveyor general in conformity therewith (all of said instructions to be taken and deemed a part of this contract), will well, truly and faithfully survey, mark and establish the back line of the private claims of John McDonogh, Jr., & Co., R. & R. No. 406, and Henry Fontenot, register's report No. 57, (the starting point to determine the said back line to be from the lowest point of the southern shore of Lake Maurepas as it now exists, as required by the decision of the Assistant Secretary of the Interior of date May 14, 1891), and all meander and other lines and connections necessary to the completion of the survey of said private claims, and to survey as public lands of the United States all lands situated to the north of said back line and between it and the rejected back line of said claims in T. 10 S., R. 6 E. as surveyed by the said deputy surveyor, Ruffin B. Paine in July and August, 1890, and approved by the surveyor general on the 25th November, 1890, and that he will complete these surveys in the manner aforesaid, and return the true and original field-notes thereof to the office of the said surveyor general on or before the thirty-first day of December next ensuing the date hereof, on penalty of forfeiture, and paying to the United States the sum mentioned in the annexed bond, if default be made in any of the foregoing conditions. And it is further expressly stipulated and made a condition of this contract, that the surveys herein described shall not be commenced before the said Ruffin B. Paine shall have been officially notified by the said surveyor general of the approval of this contract by the Commissioner of the General Land Office.

And the said surveyor general, in his official capacity aforesaid, covenants and agrees with the said Ruffin B. Paine that on the completion of the surveys above named, in the manner aforesaid, there shall be paid to the said Ruffin B. Paine by the Treasury Department of the United States, as a full compensation for all work performed under this agreement, at the rate of nine dollars for base, standard, meridian, and meander lines; seven dollars for township lines, and five dollars for section lines, per mile, for every mile actually run and marked in the field, random lines and offsets not included. And where the lines of survey shall pass over lands heavily timbered, mountainous, or covered with dense undergrowth, rates per mile shall be paid as follows, viz.: $18 per mile for base, standard, meridian, and meander lines; $15 per mile for township lines, and $12 per mile for section lines.

It is further agreed by and between the parties to this agreement that no accounts shall be paid unless properly certified by the said surveyor general (or by his successor in office) that the surveys are in accordance with the instructions herein referred to and the provisions of this agreement, and until approved plats and certified transcripts of field-notes of the surveys for which the accounts are rendered are filed in the General Land Office, and approved by the Commissioner of said office

31 And it is further understood and agreed by and between the parties to this agreement that the said surveys will not be approved by the said surveyor general (or by his successor in office) unless they shall be found to be in exact accordance with the instructions hereinbefore specified: Provided, also, that no member of (or delegate to) Congress or subcontractor shall be admitted to any share or part of this contract, or to any benefit to arise thereupon, and that no payment shall be made for any surveys not executed by the said Deputy Surveyor Ruffin B. Paine in his own proper person.

In testimony whereof, the parties to these articles of agreement have hereunto set their hands and seals the day and year first above written.

(Signed) CHAS. B. WILSON, [SEAL.]
U. S. Surveyor General for Louisiana.

Signed, sealed, and acknowledged before us—
CHARLES W. VANCE,
Residence, New Orleans, La.,
ARTHUR GASCON,
Residence, New Orleans, La.,
Witnesses to Surveyor General's Signature.

(Signed) RUFFIN B. PAINE, [SEAL.]
U. S. Surveyor, Deputy.

JAMES W. BYRD,
Residence, Toro, La.,
JOHN FRANKLIN,
Residence, Anacoco, La.,
Witnesses to Deputy Surveyor's Signature.

SURVEYOR GENERAL'S OFFICE, DISTRICT OF LOUISIANA.

I do hereby certify the above to be a true and correct copy of the original on file and of record in my office.

Witness my hand and seal officially, at New Orleans, this 11th day of Dec'r, 1891.

[L. S.] (Signed) CHAS. B. WILSON,
Surveyor General for Louisiana.

EXHIBIT "K."

Letter from Sur. Gen. to R. B. Paine, Dep., June 5, 1891, Being Special Instructions for Survey of New Back Line of Dupard Grant. Filed with Bill.

U. S. SURVEYOR GENERAL'S OFFICE,
NEW ORLEANS, LA., *June 5th*, 1891.

Ruffin B. Paine, Esq., U. S. deputy surveyor, Anacoco, La.

SIR: The following instructions, additional and supplementary to the printed "manual of instructions of January 1st, 1890," are prescribed for your guidance in the execution of your work under your contract of this date for the survey and location of the back line of the private land claims of John McDonogh, Jr., & Co., R. & R. No. 406, and Henry Fontenot, register's report No. 57, in T. 10 S., R's 5 & 6 east, southeastern district La., east of the Mississippi river, as required by the decision of the Assistant Secretary of the Interior, dated May 14, 1891.

The location of this back line will be determined in the following manner, viz:

32 After having satisfied yourself of the true location of the lowest point of the southern shore of Lake Maurepas as it now exists, you will at said lowest point run a blank compass line on a course of S. 84° 40′ W., using the proper variation (being the course adopted by you in your survey under contract No. 1 of November 11, 1889, as being at right angles to a line which would run through the center of the grant), without marking or measuring the same, to the lower side line of the Fontenot claim as established by yourself in August, 1890, under contract No. 1.

You will at such point of intersection establish the lower back corner of the Fontenot claim, and from that point you will prolong the line S. 84° 40′ W., marking and measuring the same, to the lower side line of the McDonogh claim as established by you in August, 1890, under your contract No. 1, and at such point of intersection you will establish the upper back corner of the Fontenot claim, being also the lower back corner of the claim of John McDonogh, Jr., & Co., and from said point continue the line as heretofore, S. 84° 40′ W., marking and measuring the same, to the upper side line of the claim of McDonogh as surveyed by John Kap, deputy surveyor, in 1881, under his contract dated September 25, 1880, establishing a corner at said intersection as the upper back corner of the said McDonogh claim.

In running this back line through T. 10 S., R. 5 E., you will, at

the intersection of every section line and meandered stream as surveyed by Deputy Surveyor John Kap in 1881, establish a corner and connect the same to the nearest section corner as established by said Deputy Kap.

On completion of the survey of the back line of the claims of McDonogh & Fontenot you will subdivide as public lands all lands in T. 10 S., R. 6 E., situated to the north of said back line and between it and the rejected back line of said claims as surveyed by you in July and August, 1890, under your contract No. 1. You will connect all your surveys to the lower side line of the Wm. Conway division of the Houmas grant as surveyed by John Kap, deputy surveyor, in 1881 in T. 10 S., R. 5 E., and by yourself in July, 1890, in T. 10 S., R. 6 E.

Previous to your leaving for the field you will call at this office, to be furnished with necessary copies of maps and notes as will be necessary to the execution of the surveys to be executed by you under these instructions and above-mentioned contract.

You will also compare your chain to the standard in this office.

Should any further instructions become necessary during the progress of your work you will promptly report the facts requiring the same to this office and they will at once be given.

Very respectfully,

(Signed) CHAS. B. WILSON,
Surveyor General, La.

SURVEYOR GENERAL'S OFFICE, DISTRICT OF LOUISIANA.

I do hereby certify the above and foregoing to be a true and correct copy of the original now on file and of record in my office (consisting of four pages).

Witness my official hand and seal, at New Orleans, La., this 11 day of December, A. D. 1891.

[L. S.] (Signed) CHAS. B. WILSON,
Surveyor General, La.

EXHIBIT "L."

Letter from Com'r Gen'l Land Office to Sur. Gen'l, July 10, 1891, *Approving Contract and Bond of R. B. Paine of June* 5, 1891. *Filed with Bill.*

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
WASHINGTON, D. C., *July* 10, 1891.

33 E, 83666—1891.

The U. S. surveyor general, New Orleans, Louisiana.

SIR: I am in receipt of your letter of the 30th ultimo transmitting contract and bond No. 2 (in duplicate), dated June 5, 1891, awarded to Ruffin B. Paine, U. S. deputy surveyor, for the survey and location of the back line of the private land claims of John McDonogh, Jr., and Co., and Henry Fontenot, in townships 10 south,

ranges 5 and 6 east, southeastern district Louisiana, east of the Mississippi river, as required by departmental decision of May 14, 1891; liability, $400. A copy of the special instructions issued to the deputy for the execution of the work accompanies the contract.

You were authorized to award said contract per office letter "E" of May 21st last.

In reply you are advised that the forms of said contract and bonds, as submitted, are found to have been executed in a due and legal manner. The special instructions to the deputy are satisfactory.

I have accordingly this day approved contract and bond No. 2 (in duplicate), awarded to Ruffin B. Paine, U. S. deputy surveyor, for the surveys therein designated; liability payable from the appropriation for surveys and resurveys for the fiscal year ended June 30, 1891, act of August 30, 1890.

Very respectfully,

(Signed) T. H. CARTER,
Commissioner.

SURVEYOR GENERAL'S OFFICE,
NEW ORLEANS, LA., *December* 11, 1891.

This is to certify that the foregoing is a true and correct copy of the original on file in this office (consisting of one page).

[L. S.] (Signed) CHAS. B. WILSON,
Surveyor General, La.

Defendant's Evidence on Application for Injunction.

Defendant's note of evidence. Filed January 20, 1892.

CITY OF NEW ORLEANS
vs.
R. B. PAYNE, U. S. D. S. } No. 12039.

List of defendant's evidence on motion for injunction.

1. Af't of C. B. Wilson.
2. Letter of Geo. Chandler, acting Sect. Int., to Com'r Gen'l Land Office, dated May 14, 1891.
3. Letter acting Com'r Land Office to surveyor gen'l La., dated May 21, 1891.
4. Letter of Com'r Land Office to surveyor gen'l La., dated Jan'y 23, 1891.

34 *Affidavit of Chas. B. Wilson. Offered Jan'y* 20, 1892.

CITY OF NEW ORLEANS
vs.
R. B. PAINE. } No. 12039.

Charles B. Wilson, surveyor general of Louisiana, being duly sworn, says that the survey of the Dupard grant made by U. S. Deputy Surveyor R. B. Paine under contract of November 11, 1889,

was approved by this affiant and forwarded to the Commissioner of the General Land Office for his approval; that the said survey could not become operative and a matter of record as a valid survey until approved by said Commissioner; that said Commissioner has not approved said survey, but has refused to do so and directed a new survey to be made; that compliance with such direction has been prevented by the restraining order served on R. B. Paine in the above cause.

(Signed) CHAS. B. WILSON,
U. S. Surveyor Gen'l, La.

Sworn to and subscribed before me this 20th day of January, 1892.

[L. S.] (Signed) E. R. HUNT, *Clerk.*

Letter of Geo. Chandler, Acting Sect. Int., to Com'r Gen'l Land Office, May 14, 1891. *Offered Jan'y* 20, 1892.

Copy.

DEPARTMENT OF THE INTERIOR,
WASHINGTON, *May* 14, 1891.

The Commissioner of the General Land Office.

SIR: I am in receipt of your letter of March 20, 1891, calling attention to the decision of the department of January 6, 1888, in the case of The State of Louisiana *v.* John McDonogh *et al.* (6 L. D., 473), asking for a specific interpretation of said decision upon the following question: "Did the aforesaid decision fix absolutely the starting point for the determination of the back line of the McDonogh and Fontenot claims at the most southern point of Lake Maurepas as it exi-ted at the date of the decision?"

In the case above referred to the department held that the depth of this grant could be ascertained by finding a depth equal to or corresponding with the depth of Lake Maurepas from the river—that is, by drawing a line "through the center of the grant from front to rear, terminating at the point of intersection of a line drawn at right angles thereto, so as to touch the lowest point of the southern shore of the lake."

I find nothing in this decision to indicate that it was the intention of the Secretary to authorize an investigation as to whether the shore of the lake had been changed since 1769, but, on the contrary, it seems to be clearly indicated that the southern shore of the lake as it now exists should be fixed absolutely as the starting point to determine the back line of said grant. You will instruct the surveyor general accordingly.

Herewith are returned the papers.

Very respectfully,

(Signed) GEO. CHANDLER,
Acting Secretary.

35 *Letter of Acting Com'r Land Office to Surveyor Gen'l, La., May 21, 1891. Offered Jan'y 20, 1892.*

E, 61,257—1891. DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
WASHINGTON, D. C., *May* 21, 1891.

The U. S. surveyor general, New Orleans, Louisiana.

SIR: I enclose herewith a copy of departmental decision of the 14th instant, fixing definitely the starting point from Lake Maurepas for the determination of the back line of the McDonogh and Fontenot claims in Louisiana.

This line was run by Deputy Surveyor Ruffin B. Paine under his contract No. 1, dated November 11, 1889, under instructions of your predecessor, and was accepted by this office to the extent of payment for the work, it having been done in accordance with his instructions, but the plats were withheld from filing, awaiting the decision of the department as to the correctness of the instructions in view of the original decision of the department in the case, dated January 6, 1888 (6 L. D., 473).

It is unnecessary to enter into the details of the instructions' issued by your predecessor or of the work performed by his deputy in pursuance thereof, as they form a part of the files of your office and you are no doubt familiar with them. It is sufficient to state that the enclosed decision directs that the southern shores of the lake as it now exists shall be fixed absolutely as the starting point to determine the back line of the aforesaid claims.

This necessitates the rejection of the survey executed by Paine as to the establishing of this line, and you will enter into a new contract with some competent deputy for its establishment as now directed by the department.

The same rates will be allowed as in the former survey, and the same general instructions as set forth by your predecessor in the matter of closing the lines of public surveys on this back line will be observed by you in your new instructions, differing only in such details as are made necessary by the circumstances of the case, the essential point being to start the back line of said claim from the southern shore of the lake as it "now exists."

You will therefore at your earliest convenience prepare a contract and bond, with special instructions, for the execution of the work and forward the same to this office for examination and approval.

Very respectfully,
(Signed) WM. STONE,
Acting Commissioner.

Letter of Comm'r Land Office to Surveyor Gen'l, La., Jan'y 23, 1891. *Part of Work Done by D'y Paine under Contract No.* 1 *Accepted. Offered Jan'y* 20, 1892.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
WASHINGTON, D. C., *January* 23, 1891.

The U. S. surveyor general, New Orleans, Louisiana.

SIR: Your letter, dated July 24, 1890, transmitted to this office the duplicate plat and transcript of field-notes of the survey of township 10 south, range 4 east, S. E. district of Louisiana, as executed by U. S. Deputy Surveyor Ruffin B. Paine under his contract No. 1, dated November 11, 1889, and your letter of November 25, 1890, transmitted duplicate plats of surveys under the same contract, viz:

36 Diagram in T. 10 S., R. 4 E., S. E. dist. La.
" " " 5 " "
Township plat of T. 10 S., R. 4 E., S. E. dist. La.
Diagram in " 11 " 5 " "
" " " " 6 " "

and also the following original documents, viz:

1st. Protest, dated September 3, 1890, from Hon. John McEnery, agent for the State of La., and Hon. W. H. Rogers, attorney general of Louisiana, against the approval of the survey and location of the back line of the claim of McDonogh and Fontenot.

2d. Protest, dated October 1, 1890, from Messrs. J. L. Bradford and C. W. Holcomb, attorneys for the cities of New Orleans and Baltimore *et al.*, against the approval of the survey and location of the back line of the claims of McDonogh and Fontenot.

3d. Additional protest from John McEnery, agent for the State of Louisiana, against location and approval of said back line of the claims of McDonogh and Fontenot.

Your letter of December 3, 1890, transmitted one book of transcripts of field-notes corresponding to the diagrams and plats received with your letter of November 25, 1890, and also the following affidavits regarding the change of the shore of Lake Maurepas since 1769 (said affidavits making part of the field-notes of Deputy Paine), viz:

1st. Original affidavit of Arthur Cornet and Gustavus Cambre, dated July 31, 1890.

2d. Original affidavit of John Konrad Frolich, dated July 31, 1890.

3d. Original affidavit of Henry Nickens, dated July 31, 1890.

4th. Original affidavit of Zeno Barthelotte, dated August 1, 1890; also original letter of J. L. Bradford, attorney for cities of New Orleans and Baltimore, asking that a copy of the field-notes of township 10 south, range 6 east, by Thomas P. Evans be sent to the department and "the copy of the original field-notes."

In addition to the above-enumerated papers this office is in possession of the following:

1st. A letter from Van H. Manning, Esq., attorney for Louisiana, dated Washington, D. C., September 8, 1890, enclosing a protest to the surveyor general of Louisiana and signed by John McEnery, agent for the State, and W. H. Rogers, attorney general, against the approval of Deputy Surveyor Paine's survey for reasons stated.

2d. A letter from S. L. Crissey, subagent of Louisiana, dated September 9, 1890, claiming that the survey of Deputy Paine does not give a continuous straight line from the south bank of Lake Maurepas and requesting that the line of the survey be made to conform to the rule laid down by the department.

3d. A letter from Van H. Manning, Esq., dated September 13, 1890, referring to verbal statement made by him against the approval of Deputy Paine's survey, and submits copies of letters from surveyor general of Louisiana and of John McEnery, State agent of Louisiana.

4th. A letter from Van H. Manning and S. L. Crissey, Esq., attorneys for the State of Louisiana, asking that the State be advised through them when the Paine surveys are made.

A second letter of yours of December 3, 1890, transmitted the original report of the examination in the field of these surveys by U. S. Examiner J. L. McManus, under instructions from your office dated September 11, 1890, as authorized by letter "E" of August 30, 1890, and approved by letter "E" of September 26, 1890.

The field-notes of the deputy thus far received have been examined and compared with the accompanying plats, and it appears therefrom that the work has been executed in a careful and satisfactory manner and in conformity to the terms of the contract, the special instructions forming a part thereof, and the manual of surveys of May 3, 1881, under which the work was performed.

37 The field-notes have also been compared with the examiner's report, the result of which is a confirmation of the conclusions reached by the comparison of the field-notes and plats with each other, showing a very close agreement in alignment and measurements, character, and size of corner posts and marks thereon and the number, directions, distances, and markings upon bearing trees.

In your letter of December 3, 1890, transmitting the certified transcripts of the surveys and other papers, you say:

"I beg to state that the report made by Examiner McManus, Jr, of his examination of the surveys of Deputy Payne of T. 10 S., R. 6 E., have been compared with the field-notes of said township, and, the differences, as found by Mr. McManus, being so slight, I have not hesitated in approving Mr. Paine's returns of surveys."

Examiner McManus, under the head of "general description," at the close of his report, says:

"In concluding this report I have to state that I found the lines well marked as a rule. * * * The whole work has been done in an honest, permanent way, and, considering the horrible jungle nearly all of it was done in, the wonder is that any surveyor would or could do it at all. In T. 10, R. 4, I was in mud and water all the time, often up to my middle, and in T. 10, R. 6, it was as bad, ex-

cept immediately on the banks of the lake and larger bayous. The whole region in both townships is a low, flat cypress swamp, subject to irregular overflows from rain, from crevasses in the Mississippi river, and from the water in Lakes Maurepas and Pontchartrain."

In view of the foregoing and of the condition expressed in the contract allowing partial payments as the survey progresses, I hereby accept the survey as far as herein considered, and, as the several points of objection to the acceptance of some of the lines established in this survey, as set forth in the protests above mentioned, will necessarily demand a further consideration by this office, you are directed to withhold the filing of the triplicate plats from the local land office until you are further advised in regard thereto.

Very respectfully,

(Signed) LEWIS A. GROFF,
Commissioner.

Hearing and Submission of Application for Injunction, &c.

Extract from the Minutes, November Term, 1891.

NEW ORLEANS, THURSDAY, *January* 21, 1892.

Court met pursuant to adjournment.
Present: Hon. Edward C. Billings, district judge.

CITY OF NEW ORLEANS
vs.
R. B. PAINE, U. S. Deputy Surveyor. } No. 12039.

This cause, as continued from yesterday, came on to be heard on the motion of the complainant for an injunction *pendente lite* and on the demurrer of defendant, and, after hearing further argument from counsel for the parties respectively, the court took same under advisement, counsel being allowed 5 days in which to file briefs.

Decree. Entered and Filed Feb'y 2, 1892.

Circuit Court of the United States, Eastern District of Louisiana.

THE CITY OF NEW ORLEANS
vs.
R. B. PAINE, United States Deputy Surveyor. } No. 12039. In Equity.

This cause having been heard upon the bill of complaint itself and exhibits, upon an application for an injunction *pendente lite*, and upon the demurrer filed by defendant to the bill, and the court having considered the same, it is now ordered, adjudged, and decreed, for the reasons assigned in the written opinion filed herein, that the application for an injunction *pendente lite* be denied, and that the restraining order issued herein be, and the same is hereby, dissolved.

38 It is further ordered, adjudged, and decreed that the demurrer be sustained and the bill dismissed with costs.

(Signed) EDWARD C. BILLINGS, *Judge.*

New Orleans, Feb'y 2, 1892.

Amendment Made February 8, 1892.

It is ordered that the foregoing decree be amended by adding the following words: It is further ordered, adjudged, and decreed that this decree be without prejudice to the complainant's right to sue at law for the premises included in the bill of complaint.

(Signed) EDWARD C. BILLINGS, *Judge.*

New Orleans, Feb'y 8, 1892.

Petition for Appeal to U. S. Circuit Court of Appeals. Filed February 8, 1892.

United States Circuit Court for the 5th Circuit & Eastern District of Louisiana.

THE CITY OF NEW ORLEANS
vs.
R. B. PAYNE, U. S. Deputy Surveyor. } No. 12039. In Equity.

To the honorable the judges of the circuit court of the United States in and for the 5th circuit and eastern district of Louisiana:

Your complainant in the above cause, The City of New Orleans, shows to your honors and to the said court that in the final decree rendered therein on the 2d day of the current month of February, dismissing the bill of complaint therein filed and dissolving the restraining order granted on the filing of said bill, there is manifest error, to the great injury of your orator, and that your orator desires to remove said decree by appeal to the United States circuit court of appeals for the *the* fifth circuit under sections six and eleven of the act of Congress approved on the 3d day of March, 1891, creating said appellate court.

Wherefore your orator prays that the said final decree be so corrected that it may not prejudice the right of your orator to maintain ejectment suits or any other suits or proceedings in law or equity upon the title to the lands described in said bill of complaint.

And your orator further prays that your honors will maintain and protect the present status of said property pending the appeal herein prayed by injunction *pendente lite* or such other conservative orders as to equity and justice may seem conformable, and that the appeal herein prayed and the conservative orders necessary in the premises may be allowed and granted on such terms and conditions as to bond and security as may be agreeable to the principles of law.

By their solicitor:

(Signed) J. L. BRADFORD.

Order Granting Appeal, etc.

Extracts from the Minutes, February 8, 1891.

CITY OF NEW ORLEANS
vs.
R. B. PAINE, U. S. D'y Surveyor. } No. 12039.

The complainant herein, through its solicitor, J. L. Bradford, this day presented an application for an appeal from the final decree in this cause to the United States circuit court of appeals for the fifth circuit; whereupon the court allowed the appeal prayed for, upon complainants giving a bond in the sum of two hundred dollars, said appeal to be returnable on March 9, 1892.

And under rule 93 the court orders that during the pendency of the appeal herein to the appellate circuit court the injunction as contained in the restraining order be continued in force.

39 *Assignment of Error. Filed February* 13, 1892.

United States Circuit Court, Eastern District of Louisiana.

CITY OF NEW ORLEANS
vs.
RUFFIN B. PAINE, U. S. Deputy Surveyor. } No. 12039. In Equity.

Assignment of errors.

1st. The circuit court erred in sustaining the demurrer of the defendant, R. B. Paine, and dismissing the bill of complaint:

A. Because the facts alleged in the bill and confessed by the demurrer showed that, under the law, the decision of the Department of the Interior of January 6, 1888, enforced by an approved survey, fixed the southern shore of the Lake Maurepas as it was in 1769 as the initial point to control the location of the back line of the Dupard grant.

B. Because the decision of the Assistant Secretary of the Interior of May 14, 1891, reverses and annuls said decision of 1888, which had been fully executed and finished, contrary to law and the usages and customs of the department.

C. Because under the law the matter of the survey and location of the Dupard grant was finished and at an end before and at the time of such supplemental decision and the Land Department could not thereafter assume and exercise jurisdiction to undo and reverse what had been done and on which valuable rights of the citizen depended.

D. Because the mere assertion of the power and right to further control said matter by the officers of the executive department cannot itself constitute the right and power, but the courts, in a proper case, must pass upon the validity and rightfulness of such assertion and, if found to be wrong and destructive of private

rights, to restrain the same by remedies appropriate to the particular case.

(Signed) J. L. BRADFORD,
Solicitor for New Orleans.

Bond for Appeal. Filed February 13, 1892.

Know all men by these presents that we, The City of New Orleans, as principal, and Calhoun Fluker, of New Orleans, La., as surety, are held and firmly bound unto Ruffin B. Paine, United States deputy surveyor, in the full and just sum of two hundred dollars, to be paid to the said Ruffin B. Paine, United States deputy surveyor, his certain attorney, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 12th day of February, in the year of our Lord one thousand eight hundred and ninety-two.

Whereas lately, at a session of the circuit court of the United States in and for the 5th circuit and eastern district of Louisiana, in a suit pending in said court between the said City of New Orleans, appellant, against the said Ruffin B. Paine, United States deputy surveyor, appellee, a decree was rendered against the said City of New Orleans, and the said City of New Orleans having obtained an order of appeal and filed a copy thereof in the clerk's office of the said court to reverse the said decree in the aforesaid suit, and a citation directed to the said Ruffin B. Paine, United States deputy surveyor, appellee, citing and admonishing him to be and appear before the United States circuit court of appeals for the fifth circuit, to be holden at New Orleans, Louisiana, within 30 days from the date thereof:

Now, the condition of the above obligation is such that if the said City of New Orleans shall prosecute its said appeal to effect and answer all damages and costs if it fail to make its plea good, then the above obligation to be void; else to remain in full force and virtue.

(Signed) JOS. A. SHAKSPEARE, *Mayor.* [SEAL.]
CALHOUN FLUKER. [SEAL.]

Sealed and delivered in presence of—
(Signed) J. L. BRADFORD.
WM. H. WRIGHT.

40 Bond and sufficiency of surety approved.
(Signed) EDWARD C. BILLINGS. *Judge.*

STATE OF LOUISIANA, }
Parish of Orleans. }

Calhoun Fluker, being duly sworn, says that, all his debts and liabilities being paid, he is well worth the sum of four hundred dol-

lars, and that he resides in the city of New Orleans, said parish and State.

(Signed) CALHOUN FLUKER.

Sworn to and subscribed before me this 12th day of Feb'y, A. D. 1892.

[L. S.] (Signed) WM. H. WRIGHT, *Not. Pub.*

Agreement of Counsel. Filed Feb'y 13, 1892.

United States Circuit Court, 5th Circuit, Eastern District of Louisiana.

CITY OF NEW ORLEANS *vs.* RUFFIN B. PAINE. } In Equity. No. 12039.

Agreement of counsel under rule 23 of circuit court of appeals.

An order of appeal to the circuit court of appeals having been granted in the above cause, it is agreed that Exhibits "A" and "F," filed as parts of the bill of complaint, shall go up in the original as a part of the transcript of appeal, and may be used as originals and as part of said transcript in the argument in said circuit court of appeals.

(Signed) J. L. BRADFORD,
For City of New Orleans.
WM. GRANT, *For Def't.*

Feb'y 13, 1892.

UNITED STATES OF AMERICA:

Circuit Court of the United States, Fifth Circuit and Eastern District of Louisiana.

CLERK'S OFFICE.

I, Edward R. Hunt, clerk of the circuit court of the United States for the fifth circuit and eastern district of Louisiana, do hereby certify that the foregoing 89 pages contain and form a full, complete, true, and perfect transcript of the record and proceedings had, together with all the evidence adduced, on the trial of the case of The City of New Orleans *vs.* Ruffin B. Paine, U. S. deputy surveyor, No. 12039 of the docket of the said court.

Witness my hand and the seal of said court, at the city of New Orleans, this 24th day of February, A. D. 1892.

[Seal U. S. Circuit Court for the 5th Circuit and Eastern District of La.]

E. R. HUNT, *Clerk.*

I, Edward C. Billings, United States judge for the eastern district of Louisiana, do certify that Edward R. Hunt, whose name is signed to the above certificate as clerk of the circuit court of the United States for the fifth circuit and eastern district of Louisiana, was at

the time of signing said certificate and is now the clerk of said court; that said certificate is in due form of law, and that full faith and credit are due to his official attestations as such clerk.

Given under my hand, at the city of New Orleans, in said district, this 24th day of February, A. D. 1892.

EDWARD C. BILLINGS, *Judge.*

41 *Opinion on Application for Injunction and Demurrer. Filed February* 2, 1892.

Circuit Court of the United States, Eastern District of Louisiana.

THE CITY OF NEW ORLEANS
vs.
R. B. PAINE, United States Deputy Surveyor. } In Equity. No. 12039.

Before Billings, judge.

This cause was heard upon the bill itself and exhibits, upon an application for an injunction *pendente lite*, and upon the demurrer.

The cause is really to be heard and decided on the bill of complaint so far as its allegations cover the matters involved, as it is met on the part of the defendant by a general demurrer.

The case made by the bill is as follows: The City of New Orleans, a legatee under the McDonogh will, had vested in it a complete grant, known as Dupard's, made by the Spanish government before the cession of the Territory of Orleans to the United States, the grant bearing date in 1769.

This grant had been recognized as a complete grant by Secretary Lamar, 6th vol. Land Decisions, p. 473. The only question left open by his decision is that of the point from which the northern boundary of the grant should start. Secretary Lamar in 1888 fixed the meaning of the words contained in the grant, "as far as Lake Maurepas," to mean as far as a line drawn from the lowest point of the southern shore of Lake Maurepas at right angles to a line drawn from the Mississippi river through the centre of the grant from front to rear.

The surveyor general was directed to make the survey under this decision, and he made it, ascertaining and fixing the lowest point of the southern shore of the lake as that body of water was shown to have been located in 1769, the date of the grant.

The survey so made was never approved by the department, but, on the application of the Commissioner of the General Land Office, acting Secretary Chandler in 1891 disapproved of the survey already made, which was, as has been stated, upon the basis of the starting point of the boundary as the lake existed in 1769, the date of the grant, and directed instructions to be given to the surveyor general to make the survey upon the basis of the starting point of the boundary as the lake existed in 1888, the date of Secretary Lamar's decision.

To arrest and enjoin this last survey the bill is filed.

The solicitor for the complainant urges that, under the decision of the Secretary of the Interior, the rights of his clients were conclusively fixed, and that under the guise of interpreting that decision his rights are to be totally taken away; that the decision meant to refer to the lake as it was located at the time of the grant, and that such has been the change in its location since that time that to make its present location or that of 1888 the basis of boundary would leave the city of New Orleans no land whatever under this grant; that, the right having been fixed, the court ought to interfere to prevent erroneous and destructive construction of a decision which the department does not attempt to change but only to interpret.

The solicitor for the defendant, the district attorney, on behalf of the defendant, besides his argument on the merits, presents to the court the objection that the court is entirely destitute of jurisdiction to interfere with the survey in the present state of the case in the Land Department and upon the facts presented by the bill.

It is this question of jurisdiction or authority alone upon which I feel called upon to pass.

I think with reference to this question two propositions are found to be the result of all the decisions of the Supreme Court of the United States:

42 First. That where there is a complete grant of a specific tract of land according to ascertained boundaries the grantee may sue in ejectment and protect his rights through the courts.

Secondly. That where and to the extent that there are no ascertained limits these limits must be ascertained by the executive department, which is by law charged with that duty, and that courts of justice cannot in the first instance fix by metes and bounds the location of the grant.

This results from the fact that the administration of all the lands, public and private, was upon the cession vested in the first instance in the United States Government, the public lands for the purpose of sale and practical location, the private lands for the purpose of practical location and separation and demarcation from other public lands and private lands. It would open the door to endless confusion unless these grants which needed definite location by the ascertainment of boundaries and by survey were first by practical survey to be severed from the public domain and separated from the lands of others. Most certainly must this be true of a grant one boundary of which needs to be determined before a conclusive location and survey could be made.

I am aware that there is a distinction between complete grants with completely ascertained boundaries made before the cession to the United States and grants made afterwards; but even in the former case, where, as here, a boundary is claimed to be established through the decision of the Secretary of the Interior by reference to a point as to the practical location of which the department has given instructions, as a rule of public order and general good, it must be true that the location by public survey must be made so far as the boundary thus established is concerned, for the public

survey concerns not alone one grantee, but rival claimants, who have title and claim the identical territory, and adjacent owners, and the residue of the public lands.

If the claim which is the basis of this suit needed no location by the Secretary of the Interior and no definition by survey except with reference to the public domain and the claimants under other grants, the rule above stated, it seems to me, would still obtain. It is to be observed that it is the action of the department upon which alone the complainant's boundary has been in location established. It follows, as it seems to me, the matter of fixing the boundaries of this grant, although a complete grant antedating the cession, was still wholly within the authority of the land officers of the executive department and wholly outside that of the courts.

Then comes the question, has the Land Office reached such a point or stage in its proceedings that courts can lay hold of the matter?

The boundary has been in theory reached. A survey has been made and reported, but was not satisfactory to the proper officer. The survey has been disapproved and another survey directed. I understand that it is the survey, the practical location of the grant among the other private and the public lands, which must be effected and in the proper way evidenced before the courts can have any jurisdiction over the matter.

Great hindrance would be opposed to the Government in the location of this grant if this court should now, without any power to direct another survey, and, indeed, without any jurisdiction at all over the surveyor general, enjoin the defendant from making the second survey upon the ground that the officer setting aside the former survey and directing the second had for any reason erred. It would leave the Land Department incapacitated by the action of the court from proceeding in the matter of any survey—in other words, it would arrest and forever interrupt a survey, and thus leave the action of the Land Office perpetually incomplete.

My conclusion, therefore, is that no matter how much ground the complainant has for urging that the northern or further boundary of the grant is to be reached and ascertained by taking the indicated point on the shore of the lake as it was at the time of the execution of the grant, he can now and until the final and complete survey sanctioned in the ordinary mode has been made urge it only before the officers of the Land Department; that until then it is a question to be determined by the executive and not by the judicial department.

The application for the injunction must be denied and the demurrer maintained.

43 And afterwards, to wit, on the 7th day of June, 1892, the same being a day of the November term, 1891—present and presiding, the Honorable Don A. Pardee, United States circuit judge for the fifth circuit; present also Honorable A. P. McCormick, United States circuit judge for the fifth circuit, and Honorable James W. Locke, United States district judge for the southern district of Florida—the following proceedings were had in said cause, to wit:

THE CITY OF NEW ORLEANS
vs.
RUFFIN B. PAINE, Deputy Surveyor.

This cause was called this day, and after argument by Mr. J. L. Bradford, for appellant, and Mr. Wm. Grant, for appellee, was submitted upon briefs of counsel.

44 And afterwards, to wit, on the 20th day of June, A. D. 1892, being a day of said November term, 1891, the following proceedings were had:

45 THE CITY OF NEW ORLEANS
vs.
RUFFIN B. PAINE, Deputy Surveyor.

Appeal from the circuit court of the United States for the eastern district of Louisiana.

This cause came on to be heard on the transcript of the record from the circuit court of the United States for the eastern district of Louisiana and was argued by counsel.

On consideration whereof it is now here ordered, adjudged, and decreed by this court that the decree of the said circuit court in this cause be, and the same is hereby, affirmed with costs.

It is further considered and so ordered, adjudged, and decreed that The City of New Orleans, appellant, and Calhoun Fluker, surety on the appeal bond herein, be condemned to pay the costs of this cause in this court, for which execution may be issued out of said circuit court.

46 *Agreement of Counsel. Filed Aug. 1st, 1892.*

CITY OF NEW ORLEANS, Appellant,
vs.
R. B. PAINE, U. S. Dep. Sur., Appellee.

In the above-entitled cause, an appeal having been allowed to the Supreme Court of the United States from the final decree rendered on the 20th day of June, A. D. 1892—

It is agreed that Exhibits A and F, filed as parts of the bill of complaint & brought to this court in the original, may go up in the original as parts of the transcript of the record of appeal.

J. L. BRADFORD,
Att'y for Pl'ff.
J. W. GURLEY,
Ass't U. S. Att'y.

47 *Petition for Appeal. Filed Aug. 1st, 1892.*

THE CITY OF NEW ORLEANS, Appellant,
vs.
RUFFIN B. PAINE, U. S. Deputy Surveyor, Appellee.

To the Honorable L. Q. C. Lamar, associate justice of the Supreme Court of the United States, in chambers:

The petition of The City of New Orleans, complainant in the above-entitled bill of complaint, with due respect doth show—

That in the final decree rendered in the honorable United States circuit court of appeals, 5th circuit, in this cause on Monday, the 20th day of the current month of June, there is manifest error, to the great injury of the complainant, and that said complainant desires to remove said decree for review by the Supreme Court
48 of the United States at a term to be held by said court, at the city of Washington, on the second Monday of October next ensuing.

Wherefore complainant prays that this petition of appeal, be allowed & an order of appeal be granted on such terms and conditions as to bond and security as may be agreeable to law.

THE CITY OF NEW ORLEANS.
J. L. BRADFORD, *Counsel.*

Order of Appeal.

In chambers, Bethlehem, New Hampshire.

JULY 27, 1892.

Considering the above and foregoing petition of appeal, it is ordered that an appeal be, and the same is hereby, granted to the complainant therein upon the complainant giving bond and security, conditioned as the law directs, in the sum of three hundred
49 dollars, said appeal returnable not more than thirty days from the date of the citation this day signed.

L. Q. C. LAMAR,
Justice of the Supreme Court of the United States, Assigned to the 5th Circuit.

Appeal Bond. Filed August 1st, 1892.

50 Know all men by these presents that we, the City of New Orleans, through John Fitzpatrick, mayor of same, as principal, and —— ——, as surety, are held and firmly bound unto Ruffin B. Paine in the full and just sum of three hundred dollars, to be paid to the said Ruffin B. Paine, his certain attorney, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this second day of July, in the year of our Lord one thousand eight hundred and ninety-two.

Whereas lately, at a United States circuit court of appeals holding sessions in and for the fifth circuit, in a suit depending in said circuit court of appeals, wherein The City of New Orleans is plaintiff and Ruffin B. Paine, U. S. deputy surveyor, is respondent, a decree was rendered against said City of New Orleans, complainant, and the said City of New Orleans having obtained an order of appeal and filed the same in the clerk's office of the said circuit court of appeals to reverse the decree in the aforesaid suit, and a citation directed to the said Ruffin B. Paine, U. S. deputy surveyor, respondent, citing and admonishing him to be and appear at the Supreme Court of the United States to be holden at Washington the second Monday of October next:

Now, the condition of the above obligation is such that if the said City of New Orleans shall prosecute her appeal to effect and answer all damages and costs if she fail to make her plea good, then the above obligation to be void; else to remain in full force and virtue.

JOHN FITZPATRICK, *Mayor.* [SEAL.]
CALHOUN FLUKER. [SEAL.]

Sealed and delivered in presence of—
CLARK SHEEN,
WM. H. WRIGHT.

51 UNITED STATES OF AMERICA, *Eastern District of Louisiana,* } *ss:*

Personally appeared Calhoun Fluker, who, being duly sworn, deposes and says that he is the surety on the within bond; that he resides in the parish of Orleans, Louisiana, said district, and is worth the full sum of three hundred dollars over and above all his debts and liabilities and property exempt from execution.

CALHOUN FLUKER.

Subscribed and sworn to before me this 2nd day of July, 1892.

WM. H. WRIGHT,
[SEAL.] *Notary Public, Parish of Orleans, State of Louisiana.*

Approved by—
L. Q. C. LAMAR,
Circuit Justice 5th Circuit.

52 *Opinion.*

United States Circuit Court of Appeals, Fifth Circuit.

THE CITY OF NEW ORLEANS, Appellant,
versus
RUFFIN B. PAINE, Deputy Surveyor, Appellee. } No. 32.

Before Pardee and McCormick, circuit judges, and Locke, district judge.

MCCORMICK, circuit judge, delivered the opinion of the court:

The appellant is the owner of certain lands on the left bank of

the Mississippi river, about fifty miles above New Orleans, embraced in a grant made by the French authorities on the 3d of April, 1769, to one Dupard. The land was described in the grant as having "30 arpens of front to the river, upon the whole depth which shall be found unto Lake Maurepas." The front of the grant was increased to forty arpens, which is accounted for by the action of the river increasing the arc of the bend. The authorities of the Land Department have uniformly recognized the grant as a completed grant of former governments, and no substantial difficulty has been encountered in fixing its front on the river and the direction of its side lines, following the rule that has obtained in the survey of riparian grants in Louisiana that side lines shall be extended at right angles to the general course of the bank at the points from which they depart.

The front of this grant being on the convex side of a bend of the river, the side lines rapidly diverge, the course of the upper or western line being N. 27° 48′ W., and the course of the lower or eastern line being N. 17° 10′ E. But much contention and difficulty and diversity of views by various officials of the Land Department and the successive owners of this grant and parties having rights in the adjacent lands have been experienced.

Lake Maurepas is situated toward the rear of this grant, but is not now immediately in its rear, as no extension of its side lines would touch or include any part of that lake. It seems to be certain that the western shore of the lake has receded and the southern boundary extended since the date of this grant.

The Amite river, whose waters connect with the lake, is to the rear of this grant, and the owner of the grant has claimed that the side lines should be extended to that river, and this claim appears to have met at one time the approval of the surveyor general for Louisiana, but encountered the opposition of the State of Louisiana, which was interested in the question by reason of the grant to her by act of Congress of the adjacent swamp lands. Such has
53 been the controversy as to the rear line of this grant that it is not seriously contended that its correct location was ever fixed until after a decision made by the Secretary of the Interior on the sixth of January, 1888; in which decision the Secretary, addressing the acting Commissioner of the Land Office, announced his ruling as follows:

"In this case, a line drawn through the centre of the grant from the front to the rear, terminating at the point of intersection of a line drawn at right angles thereto, so as to touch the lowest point of the southern shore of the lake, would seem to determine accurately a depth as far back as Lake Maurepas. It seems to me that this is the only rule by which the depth of this grant can be ascertained in accordance with the terms of the grant. I am therefore of the opinion that the depth of this grant only extends as far back as the southern shore of Lake Maurepas, and that the side lines of the grant should not be extended further than that depth. * * * Your decision is reversed, and you will direct that the survey of

these public lands (adjacent) be closed upon this grant in accordance with the rule above stated."

Thereupon the Commissioner of the Land Office directed the surveyor general to have the survey made in accordance with said decision. The surveyor general in executing that direction made a contract with the appellee covering the work of making the survey and instructed said deputy, November 11, 1889, that—

"The back line of the claims of McDonogh and Fontenot, being the back line of the grant to Dupard, as restricted in depth by the aforesaid decision, you will survey and locate in the following manner:

"You will carefully examine the southern shore line of Lake Maurepas, and if entirely satisfied from reliable evidence, such as is contemplated under the head of 'Private land claim surveys,' p. 111 of the printed manual, or from any other reliable proof and your own examinations that there has been a change in said shore line since the grant was made, viz., 1769, you will proceed under such proof and upon your own responsibility as a sworn officer to ascertain the position of such shore line in 1769 as near as may be.

"And if it cannot be thus ascertained to your satisfaction where it was so far back as 1769, you will ascertain where it was at any time since then, if this can be done safely and satisfactorily.

"If you find no reasons to think the shore has changed or if the evidence resulting from your examinations and from the other evidence you may obtain is not satisfactory on this point or will not enable you to fix it in any other position than it now occupies, you will conclude that its position now marks its position in 1769, when the grant was made.

"Having thus satisfied yourself as to the true southern shore line of the lake at the date of the grant, you will run a blank compass line without marking or measuring the same from the most southern point of such shore line so ascertained in a west course to the lower side line of the Fontenot claim, heretofore directed to be extended from the south line of T. 10 S., R. 6 E. You will at such point of intersection establish the lower back corner of the grant and of the Fontenot claim.

"From that point you will prolong the line west, marking
54 and measuring the same to the upper side line of McDonogh as surveyed by John Kap, establishing a corner at the intersection of the lower side line of that claim and taking connections with all township and section lines and establishing corners at such intersections."

On the 24th February, 1890, the foregoing instructions were thus modified:

"The Secretary having held, as I am now advised by the Commissioner, that such back line should not run west from the southern extremity of Lake Maurepas, but should run therefrom on such a course as will be perpendicular to the axis of the Dupard grant, your former instructions are modified as follows:

"Having satisfied yourself of the true position of the lake as directed in your former instructions, you will run the back line

therefrom on a compass direction which will be at right angles to a line which would run through the centre of the French grant, but this centre line or axis of the grant need not itself be run on the ground. Its course will be a mean between the courses of the upper and lower side lines of the grant, as heretofore established and to be established by you, as heretofore directed.

"In running such back line you will mark it, establish corners on it, and take connections of other lines it may intersect, as heretofore instructed, in every respect as though no other change had been made in your former instructions, except as to the course of the same."

The appellee, as deputy surveyor, having made the survey under these instructions, reported the same to the surveyor general's office, showing that he had thoroughly examined the lake and its shores and had taken the affidavits on the subject of all the old and reliable settlers he could readily find, which affidavits he made a part of his returns; that he could form no definite conclusion from his examination and the estimates of the settlers as to where the shore line of the lake was at the date of the grant; that the only thing which seems certain is that it was then a long way from where it now is; and he further says:

"In fixing upon the distance of 104.87 chains, I have tried to adopt a location which would probably give the claims all the depth they are entitled to, without extending them so far as some of the evidence would require."

Against the adoption of this survey Hon. John McEnery, as agent for the State of Louisiana, and W. H. Rogers, attorney general of Louisiana, and Messrs. J. L. Bradford and C. W. Holcomb, attorneys for the cities — New Orleans and Baltimore, and others, protested.

The report of the survey, with diagrams, plats, transcript of the field-notes, the affidavits made part of the returns, and the protests above mentioned, were all transmitted to the Commissioner of the Land Office for his action thereon, and on the 23d of January, 1891, the Commissioner, in a letter to the surveyor general, after reviewing the record, says:

"In view of the foregoing and of the condition expressed in
55 the contract allowing partial payments as the survey progresses, I hereby accept the survey as far as herein considered, and as the several points of objection to the acceptance of some of the lines established in this survey, as set forth in the protests above mentioned, will necessarily demand a further consideration by this office, you are directed to withhold the filing of the triplicate plats from the local land office until you are further advised in regard thereto."

The matter was submitted to the Secretary of the Interior for his decision, and on the 14th of May, 1891, the then acting Secretary gave his decision, addressing the Commissioner of the Land Office:

"SIR: I am in receipt of your letter of March 20, 1891, calling attention to the decision of the department of January 6, 1888, in the case of The State of Louisiana *vs.* John McDonogh *et al* (6 L. D., 473), asking for a specific interpretation of said decision upon the

following question: 'Did the aforesaid decision fix absolutely the starting point for the determination of the back line of the McDonogh and Fontenot claims at the most southern point of Lake Maurepas as it existed at the date of the decision?'

"In the case above referred to the department held that the depth of this grant could be ascertained by finding a depth equal to or corresponding with the depth of Lake Maurepas from the river—that is, by drawing a line 'through the centre of the grant from front to rear, terminating at the point of intersection of a line drawn at right angles thereto, so as to touch the lowest point of the southern shore of the lake.'

"I find nothing in this decision to indicate that it was the intention of the Secretary to authorize an investigation as to whether the shore of the lake had been changed since 1769; but, on the contrary, it seems to be clearly indicated that the southern shore of the lake, as it now exists, should be fixed absolutely as the starting point to determine the back line of said grant. You will instruct the surveyor general accordingly."

The then acting Commissioner of the Land Office on the 21st May, 1891, sent his instructions to the surveyor general, in which he says:

"It is sufficient to state that the enclosed decision directs that the southern shores of the lake, as it now exists, shall be fixed absolutely as the starting point to determine the back line of the aforesaid claims. * * * You will, therefore, at your earliest convenience, prepare a contract and bond, with special instructions, for the execution of the work, and forward the same to this office for examination and approval."

Thereupon the surveyor general made a second contract with appellee, as deputy surveyor, taking bond as before, for the survey and location of the back line of this grant, giving special instructions, in accordance with the Secretary's last ruling for the work, which contract, bond, and special instructions were approved by the Commissioner of the Land Office July 10, 1891. To prevent the obliterating of the former survey and the making of the new survey contemplated by this second contract with and special
56 instructions to the appellee, as deputy surveyor, the bill in this case was exhibited in the circuit court, and a restraining order granted as prayed for by appellant.

The bill for injunction coming on for hearing on the 2d February, 1892, the prayer for injunction was denied and the restraining order that had been issued dissolved. This action of the circuit court being accepted as a final decree, the appellant prayed for an appeal to this court, which was granted by the circuit court, and under rule 93 the injunction as contained in the restraining order was continued in force.

The appellant contends—

"That the law did not require the surveyor general or the Commissioner to file the approved plat of the survey of the Dupard grant in the local land office, and that, therefore, their withdrawing it from such filing did not constitute a lawful retention by either of

any control or authority over the plat or grant," and that the courts have jurisdiction to review and pass upon the subject-matter and to protect the private rights of appellant against misconstruction of the law by the officers of the Land Department; that the first survey made by appellee under the decision of the Secretary of January 6, 1888, and in compliance with the special instructions of the surveyor general, having been approved by the surveyor general, separated appellant's land, held under a completed grant by former governments, from the public domain, and exhausted the power of the executive arm of the Government over this grant, and that the subsequent action of the Secretary of the Interior transcended his authority.

Counsel for appellant cites the case of United States *vs.* Stone, 2 Wall., 525, and presses it in his oral argument as supporting his contention. In that case it appears that the land in question had been surveyed for a military reservation by orders of the Secretary of War in 1854 and the survey had been approved by the President. In 1861 the Secretary of the Interior ordered surveys to be made of the lands in question, which was done, "and everything having gone through the usual forms, patents passed the great seals, and having been signed by the President," were duly delivered to the patentees. In 1862 the Secretary of the Interior decided that the patents had been issued without legal authority, and he declared them void and revoked.

However, to proceed rightly, the United States filed a bill in the Federal court for the district in which the land was situated against the holders of the patents to have them judicially decreed to be null and the instruments themselves delivered up for cancellation. The trial court gave the decree asked for and the holder of the patent appealed to the supreme court. That court held that—

"The Secretary of the Interior in 1861 transcended his authority when he attempted to override the acts of his predecessor."

That—

"The patent is but the evidence of a grant, and the officer
57 who issues it acts ministerially and not judicially; but one officer of the Land Office is not competent to cancel or annul the act of his predecessor. That is a judicial act and requires the judgment of a court."

This case and numerous others which the diligence of counsel has presented to us, and which have had due consideration, show that when the action of the Land Department is complete and finished in any given matter, when the last act in the series essential to the transfer of title has been performed, the power of the executive department is exhausted, and private rights thereby conferred or evidenced immediately come under the protection of the judicial department, and the courts then have jurisdiction—

"To correct mistakes or to relieve against frauds and impositions, and in cases where it is clear that those officers (of the Land Department) have by mistake of the law given to one man the land which, on the undisputed facts, belonged to another to give appropriate

relief." Moore *vs.* Robbins, 96 U. S., 530; United States *vs.* Schurz, 102 U. S., 378; Johnson *vs.* Towsley, 13 Wall., 72.

All these cases and many others announce or assume that while the officers of the Government are in the discharge of their duties in dealing with the question, in what manner a survey of the public domain shall be made, the courts will not interfere by injunction or mandamus. We understand appellant's counsel to concede that the calls of this grant as set out in the original instrument are such as to require that there should be an authorized survey, to fix the lines, and separate the land embraced in this grant from the public domain, and that the Land Department was the proper authority to direct and approve such a survey, and of this we have no doubt; and while the making of such survey was still in progress it remained subject to the ultimate control of the Secretary of the Interior. And it would seem to result from the very nature of the case that the Secretary must retain authority to construe any former orders of his department so far as to determine whether the Commissioner of the Land Office and the surveyor general and the surveyors in the field have properly executed such former orders until that execution is completed.

In this case the survey was made and return made of it to the surveyor general's office in New Orleans. It was made in accordance with his instructions. He approved it, but, in accordance with the usual mode of procedure, he forwarded the report of the survey, with his approval and with the protests filed against it, to the Commissioner of the Land Office for his action, and the Commissioner, approving only so far as disbursements had been made, reserved the question as to the correct location of the rear line of the grant for further consideration and advice. Thereupon the matter was referred to the Secretary, and he was thus called on by the
58 duties and powers of his office to construe the decision of his predecessor made 6th January, 1888. There is nothing in that decision to indicate that there was present in the Secretary's mind any suggestion that the southern shore of the lake had changed its position since the date of the grant. It is therefore entirely silent on the question which has so exercised the surveyor general and the parties in interest, as to whether the most southern point of Lake Maurepas, as it existed at the date of the grant or as it existed at the date of the decision or as it should exist at the time of the survey, was to limit the depth of this grant.

No such question is referred to in that decision. But assuming that the Secretary must have meant the most southern point as it existed at the date of the grant, and that there is evidence that the position of the southern shore line of the lake has materially changed, and that its position in 1769 might still be ascertained or reasonably approximated, still the determination of this point, as it would greatly affect the area of the grant, would involve the exercise of such responsible discretion as would require that the matter should proceed subject to the ultimate control of the chief officer of the department. If there did not appear to have been any change in the position of the lake, no such question could arise.

If a change appeared to have taken place, and no satisfactory evidence could be obtained to fix its different location in 1769 or at any time since that date, there would seem to be no room for question that its present position must control.

If, however, the surveyor in the field, on evidence which failed to satisfy his own mind, adopted a conjectural point, and the surveyor general approved the survey made on that basis, against the protest of parties interested, the matter must come in the usual course of such proceedings to the Commissioner of the Land Office, and from him to the Secretary of the Interior, unless the decision, not of the former Secretary, for that is silent, but of the contract surveyor in the field, approved by the surveyor general, must in this particular case be held to be final on the subject, which we understand to be the contention of appellant's counsel.

But, with all respect, in our opinion no sound reason or semblance of authority has been offered or has occurred to us why in this case the decision of these subordinate officers should be final. When we take into view the fact that in one form or another this matter had been pending for nearly a century before January 6, 1888, it must be conceded that no undue delay has been indulged since that time in directing, considering, and acting on the survey required by the decision and order of the Secretary of that date.

Whether the construction of that order announced by the present Secretary of the Interior is in entire harmony with its terms and effect we do not feel called on by this case to decide. We are
59 of opinion that the matter of fixing the rear line of this survey on the ground was still and is still an unfinished proceeding and the proper subject for the further action of the political department of the Government.

It follows that the decree of the circuit court refusing the injunction must be affirmed and the restraining order dissolved. Cragin *vs.* Powell, 128 U. S., 691, and cases and statutes cited in that opinion.

And it is so ordered.

United States Circuit Court of Appeals for the Fifth Circuit.

I, James M. McKee, clerk of said court, do hereby certify that the above and foregoing fifty-nine pages contain a true copy of the record and the opinion of the court in the case No. 32, November term, 1891, wherein The City of New Orleans was appellant and Ruffin B. Paine, U. S. deputy surveyor, was appellee, and that Exhibits A and F, hereto attached, are the original exhibits mentioned in the agreement of counsel on page 46 of this record.

Seal United States Circuit Court of Appeals, Fifth Circuit.

Given under my hand and the seal of said court, at the city of New Orleans, this August 24th, A. D. 1892.

JAMES M. McKEE, *Clerk.*

60 The President of the United States to Ruffin B. Paine, United States deputy surveyor, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at the city of Washington within 30 days from the date hereof, pursuant to an order of appeal filed in the clerk's office of the United States circuit court of appeals for the fifth circuit, wherein The City of New Orleans is complainant & you are respondent, to show cause, if any there be, why the decree rendered against the said City of New Orleans, as in said order of appeal mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this 27th day of July, in the year of our Lord one thousand eight hundred and ninety-two.

L. Q. C. LAMAR,
Associate Justice of the Supreme Court of the United States.

61 On this 8th day of August, in the year of our Lord one thousand eight hundred and ninety-two, personally appeared before me the subscribed, William H. Wright, and makes oath that he delivered a true copy of the within citation to J. Ward Gurley, assistant U. S. district attorney for the eastern dist. of Louisiana, who is the att'y for R. B. Paine, by handing the same to him in person, at his office, in the city of New Orleans, this day.

WM. H. WRIGHT.

Sworn to & subscribed the 8th Aug., A. D. 1892, before me—

[Seal W. M. Gurley, Notary Public, New Orleans, Parish Orleans, La.]

W. MORGAN GURLEY, *Not. Pub.*

Endorsed on cover: Case No. 15,124. United States circuit court of appeals, fifth circuit. Term No., 1154. The City of New Orleans, appellant, *vs.* Ruffin B. Paine, United States deputy surveyor. Filed September 5th, 1892.

147 U. S. 261

Office Supreme Court U. S.
FILED.
OCT 15 1892
JAMES H. McKENNEY,
CLERK.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1892.

THE CITY OF NEW ORLEANS,
Appellant,
versus
R. B. PAINE, U. S. DEPUTY SURVEYOR,
Appellee.

Term, No. 1154.

ON APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

BRIEF FOR THE CITY OF NEW ORLEANS, Appellant.

J. L. BRADFORD,
Solicitor for Appellant.

BYRON S. ADAMS, PR., 512 ELEVENTH ST.

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BRIEF FOR THE CITY OF NEW ORLEANS, Appellant.

NOTE: In the following brief the "Decisions of the Department of the Interior relating to Public Lands" are cited as "L. D;" thus, "5th L. D.," "6th L. D.," &c.

The American State Papers, Public Lands, are cited thus, "3rd State Papers," "5th State Papers," &c., the edition cited being that of Gales & Seaton, in 8 vols.

STATEMENT OF THE CASE.

The following are the material facts:

France granted, April 3d, 1769, to Pierre Delille Dupard, a tract of land in the now State of Louisiana, thus described: "30 arpents of front to the river, *upon the whole depth which shall be found unto Lake Maurepas*, of the land where heretofore were two villages of the Collapissas savages, situated about 16 leagues above, and on the same side with this city, to take from the plantation of one named —— Allemand, unto its junction with that of a (person) named Joseph Lacomb, a free mulatto." (See Record, print p. 25.)

In August, 1790, the grantee having died, the Spanish Surveyor General, under decree of the Spanish Governor General (Record p. 3), surveyed the land by fixing its upper and lower side lines, measuring its front on the river, and partitioning the same among the five children and heirs of Dupard. The side lines, agreeably to custom, were only run short distances into the interior, and no back line of the grant, or of the portion of any heir, was surveyed or fixed. The side lines of the grant opening considerably as they extended into the interior; the lines separating the portions likewise opened proportionately.

In the course of time John McDonogh became the owner of nearly all the upper four-fifths of the grant, and Henry Fontenot of certain portions of the lower fifth (Record p. 23) who, after the cession to the United States of the province of Louisiana, filed their derivative claims before the different boards of land commissioners established by Congress, in order to secure the confirmation of their claims with consequent survey and protection by the government in fulfillment of the guaranties of the 3d Article of the treaty with France, of 30th April 1803 by which the province was acquired by the United States (8 Stats., 202).

The claim of McDonogh was filed before the Board of Commissioners created under Act of 27th February 1813 (2 Stats. 807), and was on the 20th November, 1816 reported by them as entitled to confirmation if it did not then stand confirmed under existing laws (Record p. 4, see 3d State Papers 245, claim No. 406). Congress acted on this report 11th May 1820 (Record p. 4, 3d Stats., 573), and confirmed or recognized the claim (Record p. 24).

The claim of Fontenot was filed before the Board of Commissioners acting under the aforesaid Act of 11th May, 1820, which board reported it for confirmation in their report of January 6, 1821, as claim No. 57 (Record p. 4, 3d State Papers, 583); and by act of 28th February 1823 (3d Stats., 727) was confirmed. Neither of these confirmatory acts nor the acts under which the claims were filed and reported, nor any other laws, ever

required any other action or duty on the part of the claimants than the filing and proving their claims as aforesaid, or required any approved plat of survey, or certificate or patent, or any other evidence of title to be made, granted or issued on or for either claim. But the act of 22d December, 1854 (10 Stats., 599—now R. S., 2447) *authorized*, thereafter, patents to issue on claims *confirmed* under laws which had not specially authorized them—such patents to operate as quit claim grants only.

In due course (Record, p. 5) the United States surveyed and fixed the front and side lines of the McDonogh and Fontenot claims, the latter opening considerably as they proceeded back from the river, when, in 1885, the State of Louisiana, claiming adversely to New Orleans (which city held as universal legatee under the will of McDonogh), under the Swamp Land grant of March 2, 1849 (9 Stats, 352), raised the question before the General Land Office as to what *depth* the claims were entitled. After full hearing the United States Surveyor General decided, on January 20, 1886 (Record, p. 7), that the depth should extend to the Amite river and Lake Maurepas, and on appeal to the Commissioner of the General Land Office his decision was affirmed (Record, p. 7). On appeal to the Secretary of the Interior, Hon. L. Q. C. Lamar, it was decided, on January 6, 1888 (Record, pp. 7 and 19), that the depth should be limited by a straight line to be drawn *from the southern shore of Lake Maurepas*, in a westerly direction, on a course at right angles to the axis of the grant to Dupard.

Under the Surveyor General's and Commissioner's decisions, the quantity of land New Orleans would have been entitled to would have been about 66,000 acres (Record, pp. 1, 2), while under Mr. Lamar's decision the quantity was reduced to about 5,000 acres (Record, p. 9), and this land, held by New Orleans as a trust fund under McDonogh's will, for the education of the poor of the city (Record, p. 2), was only valuable for the cypress and ash timber and wood growing on it, the whole being an impracticable overflowed swamp (Record, pp. 13 and 34).

In due course of administration in the land department, the decision of Mr. Lamar was enforced by a surveying contract let to R. B. Paine as deputy of the U. S. Surveyor General for Louisiana, and by special written instructions thereunder, all dated November 11, 1889 (Record, pp. 10 and 28). He was authorized to take evidence as to the situation of the shore line of the lake at the date of the grant, 1769, and to run the back line therefrom; which was done, the surveyor finding that from crevasses, storms, etc., the shallow lake had washed in southward about a mile, requiring him to run the line from a point that far north of where he actually found the shore in 1890, when he made the survey (Record, p. 34). The work

was duly examined in the field (Record, p. 9), tested in the Surveyor General's office, was regularly approved by that officer on November 25, 1890 (Record, p. 9), and was in due course also accepted and paid for by the Commissioner of the General Land Office (Record, p. 37. Thereafter, on March 20, 1891 (Record, pp. 10 and 36), that officer wrote to the then Secretary of the Interior, asking whether Mr. Lamar meant the southern shore of the lake as it existed at the *date of the grant* as the initial point to control the survey, or the shore as it should be found *when the survey was to be made* (Record, pp. 10 and 36), which officer, or rather the then assistant secretary, replied, May 14, 1891 (Record, pp. 10 and 36), saying the decision meant the shore as it was at *that date, May 14, 1891.* This ruling, or reversal of all that had been done and approved and finished, under the decision of the Department of January 6, 1888, was made by a subsequent political administration of the department, and without argument or citation of authority; though, as shown by the averments of the bill, all the prior proceedings and decisions had been conducted in strict accordance with law and the rules of practice, allowing all parties to adduce evidence and be heard by counsel.

To enforce the latter decision of the assistant secretary, made nearly three-and-a-half years after the one it virtually annulled, the Commissioner of the General Land Office (Record, pp. 10 and 37), instructed the Surveyor General, on May 21, 1891, to let a contract to his deputy, Mr. Paine, to run a new line parallel with the one he had first run, and to start from the shore line as he should find it *at the time,* and then to obliterate the old line and to survey as public land of the United States all the land between the two. Accordingly such a contract was let on June 5, 1891, accompanied by the usual special instructions (Record, pp. 38 and 40), and while the surveyor was in the field executing it, the city of New Orleans filed its bill in the Circuit Court for the Eastern District of Louisiana, to enjoin him on the ground, generally, that his acts were illegal for want of authority in the asssistant secretary to repeal the decision of the department under a former administration, which had been fully executed, and that unless restrained, the surveys, when finished, would throw open to entry, under the United States land laws, the lands between the two lines, by large numbers of settlers, who would cut and remove the timber, and against whom no adequate relief could be had at law. On the filing of the bill a restraining order was granted (Record, p. 15), a general demurrer was filed (Record, p. 17), and on the hearing the bill was dismissed (Record, p. 47), and the injunction *pendente lite* dissolved, the opinion of the Court (Record, p. 52) indicating want of jurisdiction to interfere, by injunction, with the executive duties confided by law to the Interior Department so long as such department rightfully retained control of the subject matter.

Appeal was taken and allowed to the Circuit Court of Appeals for the 5th Circuit, February 8, 1891 (Record, p. 49), and errors assigned February 13th (Record, p. 49). In allowing the appeal the Court, under rule in equity 93, restored the injunction *pendente* (Record, p. 49). The cause was heard in the Court of Appeals before Pardee and McCormick, Circuit Judges, and Locke District Judge; and on June 20, 1892, a decree was made sustaining the decree of the Circuit Court, from which an appeal was taken to this Court, and the case docketed and transcript filed here September 5, 1892.

The position taken in the courts below and now taken here by the appellant, is substantially this:

That the law devolved no duty upon McDonogh and Fontenot and their representatives, save that of bringing their titles in the way they did to the notice of the United States, in order that the same might be registered, reported upon, confirmed and segregated by public survey from the mass of the lands acquired under the treaty of 1803; that their titles were recognized, admitted and decided to be, and to have been, *ab initio*, perfect complete grants, needing nothing but a federal survey to define their limits; that no law, authority or decision required or contemplated the issue or granting, as proof of or constituting title under such grants, any certificate, approved plan of survey, or patent; that no other act or thing was required or authorized in, about or concerning such title, on the part of any federal officer, than the duty of severing the land from the domain by an approved public survey; that, as incidental to this duty and power, the jurisdiction was imposed by law upon the officers of the Interior Department to determine the question of depth, or the extent of the grant from the river into the interior; that, after this was done, in the regular and usual manner known to such department, with full argument and hearing of all parties in interest, and a final decision was rendered, disposing of all the issues of law and of fact, and such decision was executed in the only mode known to the law, it was not competent, three-and-a-half years thereafter, for a new administration of the department to reverse and undo all that had been done, and to declare and treat and dispose of as public land that which the former decisions had declared to be private property and had treated as such.

And it was contended, and will be, that under the principles founding a government of law as against power, and those recognized in the leading cases of United States vs. Schurz (102 U. S. 378), and U. S. vs. Lee (106 U. S. 197), the naked *assertion* on the part of the present head of the Interior Department, of a lawful authority to retain control of the subject matter of the survey of said grant, cannot itself oust the jurisdiction of the judicial courts in an

otherwise proper case, but that the grounds of such assertion may be inquired into, and if found to be insufficient or void the proceedings resulting therefrom may be arrrested and reversed, and justice be done according to law.

The United States represented the respondent in the courts below, in whose behalf it was contended that the Land Department rightfully retains control of the subject-matter relating to the survey of the Dupard Grant, and that, therefore, the courts have no jurisdiction, by mandamus or injunction, to interfere and control its action.

ARGUMENT:

The only relief asked is an injunction restraining defendant from enforcing a supplemental decision made on the 14th May, 1891 (12 Land Decisions of the Department of the Interior, p. 496, Record, p. 36), by an Assistant Secretary of the Interior, reversing and annulling a prior decision made January 6, 1888 (6 L. D. 473, Record, p. 19), by a Secretary of that department under a former administration, and which former decision had been enforced by public survey, which had been examined, approved and paid for, and on which valuable rights of the complainant depend.

The bill was met by general demurrer, which admits the facts well pleaded.

In the argument below in the Circuit Court it appeared from the views expressed by the Court and the position taken by counsel for respondent, that the decision of 1888 was right in itself; that it prescribed a rule for the location of the back line of the French grant in harmony with reason and the law applicable to the case, and that the decision of 1891 was a clear reversal of such decision and prescribed a totally different rule of location. It resulted from this, that the court deemed the latter decision illegal, a violation of vested rights secured by the former, and that it ought not to be enforced, and should be restrained by injunction, provided, the court, could see its way to thus interfere with proceedings in the executive tribunals. And it seemed to be the opinion of that court that it could thus see its way *if* those proceedings had been completed;—in other words, had reached the final point provided by law for the security and protection of private rights, and beyond which the Land Department could not go under the laws controlling the subject-matter.

In the court of appeals the opinion (Record, pp. 57–64) seems to proceed upon the view that the decision of 1888 in order to be enforced had to be construed; that the right and duty of construction devolved

upon those officers who were required to enforce it; that in performing this duty they adopted a construction the court would not decide was right or wrong (Record, p. 64) because until they had fully executed such construction the matter was exclusively within their jurisdiction and not the court's.

It was conceded in both courts that the bill presented a strong case for relief by injunction if the proceedings had passed beyond the control of the executive authority. This, both thought, they had not done, and the sole point, therefore, now presented would seem to be whether they had or not. We state our leading proposition then to be this:

When the survey under the decision of 1888 had been executed according to its terms, examined in the field and found to be correct, had been duly approved by the only officer authorized by law to approve it, and had been paid for by the Land Department, had not the executive tribunal then reached the final point in the proceedings above referred to?

And this must be determined by an examination of the *nature* of the act and the *power* of the officer.

We contend that it had; that the decision of the department was the final executive authority in and about the premises contemplated by the treaty of 1803 and the statutes under which the claimants of the Dupard grant had presented their titles for recognition and protection and under which they had been confirmed or recognized; that such decision and the rights and privileges secured by it became the property of the city of New Orleans and other derivative claimants under Dupard, and that there was nothing left for the subordinate officers of the department but to enforce it in the way provided by the decision itself, and that after that enforcement it was *ultra vires*, an illegal denial of vested rights, for a subsequent head of the department, upon a pretense of interpreting it, to virtually annul and reverse it and undo and unsettle all that had been regularly and lawfully done and finished under it. Subordinate to our leading proposition we, therefore, assert:

A. That it is fundamental law, sanctioned by long usage in the executive tribunals, and sustained by innumerable decisions in those departments and the courts, that the final decisions of the head of one of them can in general only be reversed, modified, or annulled, by succeeding heads in the same department, for fraud, errors of calculation or on newly discovered evidence.

B. That if such decision of one head of a department cannot thus be directly modified, reversed or annulled by his successor, it cannot be done indirectly, under the guise of interpreting it.

As to proposition A:

In the Beaubien and Miranda case, (Copp's Public Land Laws, p. 605), the Secretary of the Interior, Mr. Cox, had on the 31st December 1869, directed the Commissioner of the General Land Office to survey the grant then in question, for a certain amount, and in 1871 the parties in interest applied to the successor of Mr. Cox, Mr. Delano, for an order for another kind of survey. But it was refused, the Secretary saying: "However well satisfied I may be that the construction put upon the Act of June 21, 1860, was erroneous, still I do not feel justified in reversing it. If I can review and reverse in this case, then my successor, if he should differ with me and agree with my predecessor, could review and reverse my action, and so on indefinitely, and there would be no end to controversy.

For this reason it has been uniformly held by the learned gentlemen who have filled the office of Attorney General, that the decision of the head of a department was final, and binding upon his successor. See the opinion of Mr. Wirt, 2 Op., 9; of Mr. Toucey, 5 Op., 29; of Mr. Johnson, Id., 123; of Mr. Black, 9 Op., 101, 301, 387; of Mr. Stanbery, 12 Op., 358; of Mr. Hoar, of April 26, 1869, and of Mr. Ackerman, of May 5, 1870. See also *U. S. vs. Bank of Metropolis*, 15 Pet., 401. I do not hesitate to say that, if the question as to the construction of this grant were *res integra*, and presented in such a form as to allow me to decide upon it, I should feel constrained to differ with my predecessor in regard to it; but as it is, I feel bound by his decision, and must leave the parties to Congressional or such other relief as they may be able to obtain."

The authorities cited by Mr. Delano amplify his position. They are too numerous for us to refer to at large.

Likewise in "Heirs of Murray McConnell (2 Copp's Land Owner, p. 83), the same Secretary, on May 31, 1875, refused to reopen a case settled in 1858 by the department, although convinced the former decision was erroneous in law and fact, and the applicant entitled to relief. Said he: "Upon a careful examination of all the papers submitted, I am of opinion that my predecessor erred, both as to law and fact, and that the applicants, upon considerations of equity and justice, are entitled to the relief sought. The only question upon which I have had any doubt relates to my power to set aside the decision of my predecessor and consider the merits of the claim. The almost uninterrupted current of authorities on this point sustains the general proposition that an executive officer has no power or authority to reverse or review a decision of his predecessor except upon newly discovered evidence which would probably have changed the former decision, not known to the applicant at the time of the hearing, and which he could not have produced by ordinary diligence."

The Secretary then cites the above authorities in the Beaubien–Miranda case, concluding with that case itself and continued: "There is no such newly discovered evidence in the case under consideration. The only thing that approaches it is this: one of the facts found by my predecessor was, that the land in contest had never been offered at public sale. The affidavit of one E. D. Taylor, who was receiver of the local office in 1835–6 is now filed, in which he swears that he offered the land at public sale in June, 1835, under a proclamation of the President, dated February 12, 1835. It is apparent, however, that this evidence, even if filed in the department prior to 1858, would not have changed the departmental decision, inasmuch as better evidence, viz: the records of the office, were not considered sufficient to establish the fact; and there is no sufficient showing that this particular evidence now presented is newly discovered or could not by ordinary diligence have been produced at the former hearing. I am compelled, therefore, to consider the case as *res adjudicata* and to deny the prayer of the applicants."

The same case came before the successor of Mr. Delano, Mr. Secretary Chandler, on December 20, 1875, (same vol. p. 149) who in an exhaustive decision refused to interfere, saying, p. 150: "The principle that the decision of a question of this nature, affecting private rights, by the head of a department, is binding upon his successor, is well settled by a long course of administrative rulings, sustained both by the opinions of the Attorneys-General and the decisions of the Courts.

Opinion, Mr. Bristow, 13 Op., p. 457, and cases there cited, and also Sargeant, et al., *vs.* U. P. R. R. Co., Copp's Pub. Land Laws, p. 421; McGarrahan case, Ib. 532; Beaubien and Miranda, Ib. 605.

In the language of Atty.-Genl. Cushing; 'If it were otherwise, there would be no security or stability for any rights of property acquired under the action of the government.'

So far as the action of this department is invoked, the decision of Comr. Brown, affirmed as it has been by my predecessors, must be considered as binding, and having settled the question finally."

In the Rancho San Rafael case (3 L. D., 438), Secretary Teller, on March 3, 1885, ordered a preliminary survey of the grant, which, not having been executed when the extraordinary Mr. Sparks became Commissioner of the General Land Office, he recommended the head of the department, Mr. Lamar, to revoke the order. His reply was pointed and significant, said he: (4 L. D., 482), "It is unnecessary to determine what conclusion I might reach if the question as to the issue of the order was before me as an original question, but having been passed upon by my predecessor with all the facts and law before him that are now submitted to me, I do not deem it consistent with good administration to reconsider his action, Unless

the principle of *res-judicata* is recognized, administrative action may become involved in chaos; the labors of the department would become too cumbrous to admit of their intelligent discharge; uncertainty would cloud every inchoate title and, in many instances vested rights would be endangered. Our present duties are amply sufficient to command our whole time and attention without entering unnecessarily into the enquiry as to the intelligence with which every past duty was performed.

As early as October, 1825, Attorney-General Wirt in 2d Opinions, p. 8, gives expression to his views in the following language: "If it has such authority, the executive which is to follow us must have the like authority to review and unsettle our decisions, and to set up again those of our predecessors, and upon this principle no question can be considered as finally settled * * * hence I have understood it to be a rule of action prescribed to itself by each administration to consider the acts of its predecessors conclusive as far as the executive is concerned." This opinion has been substantially corroborated by like opinions of Attorneys-General Taney, Nelson, Toucey, Johnson, Black, Stanbery, Hoar and Bristow in 2d Op., p. 464; 4th Id., p. 341; 5 Id., p. 124; 9th Id., pp. 101, 301, 387; 12th Id., p. 355; 13th Id., pp. 33, 387, 456.

"The doctrine has been adopted generally in the practice of the department, as is illustrated in 3 L. D., pp. 21, 196, 199, 537, 559, 595, and many other earlier cases. That there may be, and are exceptional cases which justify a departure from the general rule is undoubtedly true, but I see nothing in this case sufficient to bring it within the exceptions. * * *" He concludes thus (p. 484): "I therefore decline to revoke the order of my predecessor. * * *"

In re State of Oregon (9 L. D., 360), the Secretary of the Interior, Mr. Vilas, had, by final decision of 27th December, 1888 (7 L. D., 572), revoked and set aside certain lists of swamp land selections, and a motion for review was filed before his successor, Mr. Noble, after the expiration of the 30 days allowed under the rules of practice, unless such motions were based on newly-discovered evidence—which was not alleged in this case. The motion was denied by Mr. Noble, who said (p. 362): "It thus appears that eighty days intervened between date of notice of decision and that of filing motion for review. Not only this, but there had in the meantime been a change in the head of the department. Secretary Vilas had resigned, and the motion was addressed to me as his successor. * * * As presented, it is not only out of time, but the matters decided are, under the rulings and decisions, not now subject to review by this department.

It has been well settled by a long line of opinions of Attorneys-General of the United States that the final decision of a head of de-

partment is binding upon his successors in the same department, subject to certain well defined exceptions, such as palpable error of calculation, or where new facts are subsequently brought forward which show that the former decision was erroneous and would probably not have been made if they had been known at the time of the decision."

He then cites the usual authorities so often cited by his predecessors in support of the principle and concludes: "Finding the principle above enunciated supported by the opinions and decisions cited and by others not here cited, I must recognize its application to the case presented and deny the motion for review on the ground that the matters sought to be reviewed are not properly before me for decision."

We conclude this branch of the argument by citing the "Kopperud case" (10 L. D., 93), decided by Assistant Secretary Chandler, January 30, 1890, the same officer who afterwards reversed his predecessor in office in the case at bar.

A decision of the department having been rendered April 16, 1888, in what was called the "Hooper case" (6 L. D., 624), under the timber culture laws, in the analogous case of Kopperud, June 2, 1888, the department made a decision rejecting the final proof, basing it upon the ruling in the Hooper case. The Hooper case was itself modified, or rather the ruling under it by the department, July 16, 1889, (9 L. D., 86), and thereupon Kopperud applied for the review and reversal of the ruling adverse to him. But so strongly rooted were the axioms of *stare decicis and res adjudicata* in the department that this was refused. Said Mr. Chandler (p. 94, 10 L. D.): "If the ruling in the Hooper case has the force of law until changed, then the departmental decision could not have been different in the Kopperud case, and was correct at the time it was rendered and not an "absurdity," as contended by counsel. Moreover, said decision was rendered by Mr. Secretary Vilas, and I am unaware of any rule of law that will warrant one head of a department to reverse the final action of his predecessor, except in certain well defined cases which are not present in the case at bar."

"In the case of Henry T. Wells (3 L. D., 196), Mr. Secretary Teller said: "If, as I think was the fact, Wells' whole claim was before Secretary Delano and passed upon in his decision, then that decision was final and conclusive, and the present claim is *res judicata* so far as this department is concerned. It matters not that that decision may have been erroneous, or that the department has since held differently. It is sufficient that it was a decision."

"The learned Secretary cited as authority for his decision the opinion of the Hon. Attys.-Genl. Wirt, Taney, Nelson, Toucey, Johnson, Black, Stanberry, Hoar, Ackerman, and Bristow, (2 Op.,

pp. 8, 464; 4 Id., p. 341; 5 Id., p. 124; 9 Id., pp. 101, 301, 387; 12 Id., p. 355; 13 Id., pp. 33, 387, 456). To the same effect are the departmental decisions in the cases of Robert Carrick, (3 L. D., p. 558); State of Oregon (Id., p. 595); Henry A. Pratt, *et al.*, (5 L. D., 185); State of Kansas, (Id., p. 243); Francis Palms, *et al.*, (7 L. D., p. 146). In the last named case Mr. Secretary Vilas quoted, with approval, from the decision of Secretary Lamar, in the case of Rancho San Rafael de la Zanja (4 L. D., p. 482), wherein he said: "

"Unless the principle of *res judicata* is recognized, administrative action may become involved in chaos; the labors of the department would become too cumbrous to admit of their intelligent discharge; uncertainty would cloud every inchoate title, and, in many instances, vested rights would be endangered."

See also State of Oregon, on review, (9 L. D., p. 363).

The authorities above cited are in harmony with the repeated decisions of the Supreme Court of the United States. In the case of the United States *vs.* Arredondo (6 Peters, p. 729), Mr. Justice Baldwin said:

"It is an universal principle that, where power or jurisdiction is delegated to any public officer or tribunal over a subject matter, and its exercise is confided to his or their discretion, the acts so done are binding and valid as to the subject matter; and individual rights will not be disturbed collaterally for anything done in the exercise of that discretion within the authority and power conferred. The only question which can arise between an individual claiming a right under the acts done and the public, or any person denying its validity, are, *power in the officer and fraud in the party.* All other questions are settled by the decision made or the act done by the tribunal or officer, whether executive (1 Cranch, pp. 170, 171), legislative (4 Wheat., p. 423; 2 Pet., p. 412; 4 Pet., p. 563), judicial (11 Mass., p. 227; 11 S. and R., p. 429; adopted in 2 Pet., pp. 167, 168) or special (20 J. R., pp. 739, 740; 2 Dow., P. Cas., p. 521, etc.), unless an appeal is provided for, or other revision, by some appellate or supervisory tribunal, is prescribed by law."

Again, in the case of U. S. *vs.* Bank of Metropolis (15 Pet., p. 401), which arose upon the question whether the Hon. Postmaster General had the power to disallow certain items of credit for extra allowances, which, it was alleged, the former Postmaster General "was not legally authorized to allow," Mr. Justice Wayne, delivering the opinion of the court, said:

"The successor of Mr. Barry had the same power, and no more, than his predecessor, and the power of the former did not extend to the recall of credits or allowances made by Mr. Barry if he acted within the scope of official authority given by law to the head of the department. This right in an incumbent of reviewing a prede-

cessor's decision extends to mistakes in matters of fact, arising from errors in calculation, and to cases of rejected claims, in which material testimony is afterwards discovered and produced. But, if a credit has been given, or an allowance made, as these were, by the head of a department, and it is alleged to be an illegal allowance, the judicial tribunals of the country must be resorted to to construe the law under which the allowance was made and to settle the rights between the United States and the party to whom the credit was given.. It is no longer a case between the correctness of one officer's judgment and that of his successor.

"It must be conceded, upon the foregoing authorities, that the decision of Mr. Secretary Vilas, in the case at bar, is conclusive and binding upon all the officers of this department. This being so, it follows, necessarily, that the decision rejecting said proof must remain in full force and effect."

Mr. Chandler, himself, having cited the language of this court in U. S. vs. Bank of Metropolis in support of the principle we contend for, we will call attention to the ruling of the same court in U. S. vs. Stone, 2 Wal., p. 525 and proceed to the next proposition, B.

From what can be understood from the report of the case it seems that in order to effectuate the pledges of the treaties of 1818 and 1829 with the Delaware Indians, and under a Senate resolution of 1830, a survey by one McCoy, under the orders of the President, was made in the same year, of the Camp Leavenworth, under which the camp, and thereafter the reservation, was surveyed so as to have a front on the west bank of the Missouri river (which ran south at that point) of six miles, and a depth of four miles. We infer that the side lines of this McCoy survey of 1830, or at least the southern side line, ran east and west, or nearly so. In 1839 Captain Johnson, of the War Department, also surveyed the reserve, giving it a little less depth than McCoy gave it, his southern or lower side line, so far as it went, being identical with McCoy's. In 1854 Captain Hunt, under the War Department also surveyed the tract, following McCoy's lower side line out two miles and three-quarters from the river, but curtailing the tract in the rear still further than Johnson had done. The President then *reserved* the tract as surveyed by Hunt. It appeared that the actual buildings, forts, etc., were considerably north of the south side line as fixed by the three surveys, and that in 1861 the Secretary of the Interior, for some reason not shown, ordered a new boundary line a little further north than the old one, and the strip of land thus thrown out of the reservation was at once located with "floats" which had issued to the Indians and which they had assigned to Stone. In due course patents issued and the United States brought suit in equity to annul them. Their validity depended upon the legality of the sur-

vey of 1861 changing the line and creating Indian land where under former surveys the land had been reserved as that of the United States. Said this court, affirming the decree below cancelling the patents (2 Wal. p. 537):

"The Secretary of the Interior, in 1861, transcended his authority when he attempted to overrule the acts of his predecessors, and ordered surveys to be made north of that line to include the land now in question."

The Court of Appeals, in its opinion (Record, p. 62), seems to regard this decision on this point as of no application because, patents having issued, the subject-matter had passed beyond the jurisdiction of the executive officers, and the courts, therefore, had authority to review its acts. But the objection is apparent only, not real. For under the laws controlling the matter, the lands, being public lands, the patent alone could convey the title, and was the last step in the executive proceedings which the Land Department could possibly take (Johnson *vs.* Towsley, 13 Wal., p. 72; U. S. *vs.* Schurz, 102, U. S., p. 378). Whereas, in the case at bar, the land covered by the Dupard Grant was never public land, and no law required patent or other evidence of title to issue on it. Hence, as to it, if we show that the approval of the public survey authorized by the decision of 1888 was the last act by the executive authority the case admitted of, or the law authorized, the same finality of executive power will result as followed the issue of patents in the other case. It is this point of finality, when reached in any case, which marks the frontier of executive jurisdiction beyond which it cannot lawfully go, and at which the jurisdiction of the courts begin. In one case it may be the issue of the patent, as in alienations generally of lands once the property of the Government. In the other, it may be the approval of the survey or the issue of the confirmation certificate, as is often the case in private land claims originating in a foreign source and recognized by treaty or confirmed by statute, and where no law requires the issue of patent. Of this latter class we contend the case at bar is one.

We think the foregoing authorities leave no doubt that the judgment of Mr. Lamar, as the head of the Interior Department, made in 1888, was beyond the power of his successor to annul by direct order made nearly three years and a half afterwards. They show to the court that, by the law and usages of that high executive tribunal itself, as well as by the decisions of the courts, its deliberate judgments, finally disposing of a matter involving private rights, have the qualities of a judgment at law, are irreversible save by appeal, review, new trial, or some other lawful mode analogous to those known to the common law for the reversal, annullment, or modification of judgments.

We pass, therefore, to proposition "B" (see p. 7. *ante*).

In the Circuit Court and Court of Appeals it was not, as we remember, contended in argument by respondent that the judgment of 1888 was open to construction as to whether the southern shore of Lake Maurepas as it was in 1769 was meant as the initial point to govern the survey. But some expressions in the opinion of the Court of Appeals (Record, p. 63) show that that Court thought the decision of 1891 might be justified as an interpretation or construction of the other, and what we have to say therefore on this head is more in anticipation of what the Solicitor General may urge here than to meet any argument made below.

If Assistant Secretary Chandler could not lawfully annul and reverse the judgment of the head of the department under a previous administration by a *direct order* to that effect, it will hardly be contended that he could do so indirectly.

Indirection and circuity strangle justice. The "simple truth" and faith of Cromwell wrung from the fallen Woolsey the tears no calamity could extort.

We contend, firstly: *That the decision of Mr. Secretary Lamar, of 1888, was not properly open to construction when the Assistant Secretary made his decision of 1891. In the second place we contend that if it was, then the construction of Mr. Chandler was plainly erroneous.*

First: It was not open to construction, because not only had it been previously enforced and executed as regularly and fully as the nature of the case admitted, but the execution had been preceded by full and exhaustive interpretation and construction by the officers whose duty it was to execute it. The bill alleges (Record, pp. 7–8) that the defendant was specially instructed by the Surveyor General to take evidence as to where the lake shore was at the date of the grant and invested with discretionary power to decide the matter, and to run the back line from such point *due west*. These instructions, dated November 11, 1889, are a part of the bill (Record, pp. 27–31). It is also alleged (Record, p. 8) that these instructions were by the Commissioner of the General Land Office submitted to the *Secretary of the Interior for his approval*, and that the same were approved by him in *all things*, save that the Secretary required that the back line should be run in a course *at right angles to the axis of the grant* instead of due west. These were material facts, duly alleged in the bill, and were admitted by the demurrer. They do not appear by the exhibits or other proofs as fully as they might for that reason. But they do sufficiently appear. "Exhibit C" (Record, p. 28) contains the first instructions of November 11, 1889, and "Exhibit D" (Record, p. 32) contains the amended instructions of 24th February, 1890, telling the surveyor to run the line not west, but at right angles to the axis of the grant. "Exhibit E" is the letter of

March 4, 1890, from the Commissioner of the General Land Office to the Surveyor General informing him that both sets of instructions had been found satisfactory and were, with the contract, to enforce which they had been issued, duly approved. Now, the Surveyor General had stated in his amended instructions to his deputy (Record, p. 32) that the first instructions had been submitted *to the Secretary*; that the only change wrought in them was as to the *course* of the back line, and that such change was *made by the Secretary* and no one else. If all this did not show that the head of the department had, before the survey was made, fully construed the judgment of 1888, it is difficult to see what would do so.

Again, the construction placed upon the decision of 1888 on May 14, 1891, (Record, p. 36) was six months after the decision had been carried into effect by survey—which survey it is not denied was strictly conformable to the contract, the instructions of November 11, 1889, and the amended instructions of February 24, 1890. The bill alleges (Record, p. 9) "that on the 25th day of November, 1890, the said Surveyor General approved the said survey and location of said back line of said French grant to Dupard, as surveyed and located aforesaid by said R. B. Paine."

The demurrer admits this fact. We are entitled to the legal consequences of this admission. If the Government denied the fact the issue should have been raised by answer, which would have let in evidence. But the exhibits to the bill sufficiently prove the fact if not confessed by the demurrer. "Exhibit I" (Record, p. 40) is the letter from the Commissioner of the General Land Office to the Surveyor General of May 21, 1891, directing him to make a new survey, in which, referring to the back line run by the surveyor, under Mr. Lamar's decision, it is stated:

"This line was run by Deputy Surveyor Ruffin B. Paine, under his contract No. 1, dated November 11, 1889, *under instructions of your predecessor*, and was accepted by this office to the extent of payment for the work, *it having been done in accordance with his instructions;* but the plats were withheld from filing, awaiting the decision of the department as to the correctness of the instructions, in view of the original decision of the department in the case, dated January 6, 1888. (6 L. D. 473.)

It is unnecessary to enter into the details of the instruction issued by your predecessor, or of the work performed by his deputy *in pursuance thereof*, as they form a part of the files of your office, and you are no doubt familiar with them. It is sufficient to state that the enclosed decision directs that the *southern shore of the lake as it now exists* shall be fixed absolutely as the starting point to determine the back line of the aforesaid claims.

This necessitates the rejection of the survey executed by Paine as to

the establishing of this line, and you will enter into a new contract with some competent deputy for its establishment, as now directed by the Department."

"Exhibit J," (Record, p. 41), is the new contract let to the same Deputy Surveyor, requiring him to obliterate his former survey and to run the new back line, in which it is said that the former survey had been made by Mr. Paine in July and August, 1890, and had been "*approved by the Surveyor General on the 25th of November, 1890.*" "Exhibit L.," (Record, p. 45), is the letter of the Commissioner of the General Land Office to the Surveyor General, of July 10, 1891, in which he approves the above contract, and the special instructions of June 5, 1891 issued to enforce it, (Record, p. 43); thus admitting, what the contract stated, that the former survey had been approved long before the supplemental decision of Mr. Chandler was made.

Secondly: *If the decision of 1888 was open to construction on May 14, 1891, the interpretation then put upon it was clearly erroneous.* It was not contended in argument before the Circuit Court that it was just, or was aught but a reversal of the decision itself, and the circuit judge, while holding he had no jurisdiction, because the matter was still before the land department, said that it was contrary to reason and subversive of the best principles controlling the location of grants, to believe the learned author of that decision meant to adopt the rule imputed to him by his successor. In the Court of Appeals the opinion, while declining to state whether the construction was good or bad (Record, p. 64), held that *some* construction was necessary in order to enforce the judgment, because (Record, p. 63), there "was nothing in the decision to indicate that there was present in the secretary's mind any suggestion that the southern shore of the lake had changed its position since the date of the grant." But an attentive reading of the decision will show that the secretary did consider this. He said, (Record, p. 26):

"*If* the side lines of the grant are correctly located, and the western and *southern shores of the lake are* the same as they were when the grant was made, it shows that while Lake Maurepas is not immediately in the rear of the grant it nearly adjoins one side of it and is in the direction of the rear. Lake Maurepas is situate north of the river, while the grant runs from the river to the north in the general direction towards Lake Maurepas."

That he did not tell his subordinates that in adopting the southern limit as an initial point to control the survey he meant such point as it was at the date of the grant and not as it might be a hundred and thirty years later, was doubtless because, if he thought of it at all, it never occurred to him that any other rule could be imagined. And indeed, it never was thought of, as we have seen, until nearly three and a half years afterward.

To cite authorities to this court to show that the decision of 1888 meant that the lake as it was at the date of the grant should control, and not as it might be at the particular time the severance was made by actual survey, would imply a slur on the ability of the court. As well might our adversaries contend, supposing the call in the grant had been for a marked tree on the then margin of the lake, which a crevasse had afterwards torn up and carried southward to the point that now marks the southern shore, that such tree must necessarily control, notwithstanding the change! Suppose instead of the shallow lake moving southward under the mighty agencies of 130 years operating on its alluvial shores it had by filling up moved northward an equal distance. Would the Government then contend that the grant must be *increased* by still following the moving shore? Or suppose, for argument's sake, the washing of the southern shore had carried the lake, instead of 104 chains, as found by the surveyor (Record, p. 34), it had carried it so far southward that the line from its most southern point run the proper course westerly would have struck the river before reaching the grant! What, then, would have become of the theory contended for? The result would needs have been no back line at all; no grant; no survey; no land left to the grantee and his representatives!

Mr. Lamar did not adopt the rule that the southern shore must control because *he* thought the result would be to give as much land and no more to the cities of New Orleans and Baltimore on the one side and the State of Louisiana on the other as they were entitled to. That would have been to strike a balance; to compromise their rivalries. Had the cities and State agreed to divide the disputed territory by locating the line north or south of the initial point called for in the grant, the head of the department could not have surveyed the grant to effectuate such a compromise. But he adopted the rule because the French authorities in making the grant in 1769 had, in his view, seen fit to limit the depth of the thing they gave by prescribing, as a controlling element, a landmark which was historically well known and notorious, and which, it must be assumed, those authorities were acquainted with. In other words, he enforced a limitation of depth because the grantors had intended it. And he practically applied the limitation by survey on the ground because they had adopted a call for a natural object still capable of approximate identification. He could not understand Aubry and Fourcault, who made the grant on the 3d of April, 1769 of "30 arpens of front to the river, *upon the whole depth which shall be found unto Lake Maurepas*." (Record p. 23), as referring to the lake as it might be 130 years afterwards, but as they knew it to be at the time; as their engineers and charts and surveys of other grants had acquainted them with it. They were notp rophets, nor astrologers,

forecasting the future and providing for its changes. These reflections show to what strange, yet strictly logical results Mr. Chandler's interpretation must lead. Nor have we named them all; nor can they be named. They multiply with thinking: Suppose *his* successor, after his survey has been made and approved, opens up his decision for construction only, as he has done that of his predecessor, and the result is still another back line to be run some years hence. Now it is certain the agencies which have carried the shore line south 104 chains in 130 years are still shifting it slowly. By this rule his own line will then be wrong, and the only correct one will be still a new one run from the southern point as it then happens to be.

The proper mode of surveying the back line of the Dupard grant will occur to this court from the following authorities, which enforce the fundamental rule that when capable of identification, natural objects must control calls for courses and distances:

2d Phillips' Ev., 783, and notes;
Denn *vs.* Wright, Pet. Ct. Ct. Reps., 64;
Cotton *vs.* Seavy, 22 Cal., 496;
3 Washburn Real Prop., 347, 349, 350, 351, 354, 363, 364, 3d Ed.

In Cotton *vs.* Seavy (*supra*) the Supreme Court of California said: "It is clearly established that when a deed of land describes the subject matter by monuments clearly identified, such as a river, a spring, a mountain, a marked tree, or other natural object, and courses and distances and quantity are likewise inserted, which disagree with the monuments, the description by monuments shall in general prevail, for it is more likely that a person purchasing or selling land would make mistakes in respect to course, and distance, and quantity, than in respect to visible objects, which latter, from being mentioned in the deed, are presumed to have been examined in time."

In Jackson *vs.* Sprague (1 Paine's Ct. Ct. Reports, 494), the court said: "Where the quantity of a tract of land is given, as well as the metes and bounds, the latter will control the location. Where the different parts of a description of the metes and bounds are repugnant and contradictory to each other, such parts are to be rejected, and such retained, as will leave enough plainly and clearly to designate the land intended to be conveyed."

In Perman *vs.* Wead (6 Mass. Reports, p. 131), it is said: "When the boundaries of land are fixed, known, and unquestionable monuments, although neither courses, nor distances, nor the computed contents correspond, the monuments must govern."

"If a call be made for a natural or artificial object, it shall always control mere course and distance," (Holmes *et al. vs.* Trout, 7 Pet., 171).

"If a location have certain natural calls, sufficient to support it, and to describe the land, other calls less material and incompatible with the essential calls of the entry may be discarded," (Massie *vs.* Watts, 6 Cranch., 165.)

"Recourse is to be had 1st, to natural objects; 2d, to artificial marks; 3d, to course and distance," (Bolton *vs.* Laun, 16 Texas, 110, 113.)

"It is a general principle that the course and distance must yield to natural objects called for in the patent," (McIvers *vs.* Walker *et als.*, 4 Wheat., 445.)

"A call for a natural object, as a river, a known stream, a spring, or even a marked tree, shall control both course and distance." (Chief Justice Marshall in Newsom *vs.* Pryor's Lessee, 7 Wheat., 7.)

"Where more than one description is given, and there is a discrepancy, that description will be adhered to as to which there is the least likelihood that a mistake could be committed, and that rejected in regard to which mistakes are more apt to be made," (3 Washburn on Real Property, 3d Ed., 348–53)

"There is no principle of land law more firmly settled in this, and probably most of the States, in respect to country lands than this: That where the calls of a deed, or other instrument, are for natural or well known artificial objects, both courses and distances, when inconsistent with such calls, must give way and be disregarded," (McPherson *vs.* Foster, 4 Wash. Ct. Ct. Reports, 45.)

These liberal rules of construction have been applied in the mass of the decisions on French, Spanish and Mexican land claims (U. S. *vs.* Clark, 8 Peters, p. 436; U. S. *vs.* Huertas, do., p. 488; U. S. *vs.* Davenport, 15 How., p. 1; U. S. *vs.* Patterson, do., p. 12; Fremont *vs.* U. S., 17 How., p. 543). In Buyck *vs.* U. S., (15 Peters, p. 224,) the court declares: "In all of the decisions of this court upon grants in Florida it has gone as far as the most liberal equity can go in adopting some natural or artificial point in the description of the grants, however subordinate or minor they may have been to give locality to grants." The grant was rejected because of its extreme vagueness. Upon this point the court adds: "It is proper for us to remark that in coming to our conclusion upon this point we have not been influenced by any of the English common-law rules which make grants void for uncertainty." * * * "We apply to the case the laws and ordinances of the government under which the claim originated; and that rule which must be of universal application in the construction of grants, which is essential to their validity, that the thing granted should be so described as to be capable of being distinguished from other things of the same kind, or be capable of being ascertained by extraneous testimony."

In the Fremont case it was said (p. 561): "In deciding upon the

validity of a Mexican grant, the court could not, without doing injustice to individuals, give to the Mexican laws a more narrow or strict construction than they received from the Mexican authorities who were entrusted with their execution. It is the duty of the court to protect rights obtained under them, which would have been regarded as vested and valid by the Mexican authorities."

Before dismissing this branch of our argument we ask attention to an oversight or inconsistency in the decision of 1891, which is suggestive of some things as well as others. The Houmas grant, like the Dupard grant, was within the contract of Deputy Paine and covered by the same special instruction of November 11, 1889 (Record pp. 27-31). By the judgment of this court rendered in 1884 (111 U. S., p. 412) it was held the depth of the Houmas grant was 80 arpens, that grant fronting on the river far above and on the same bank with the other. Now, in surveying the back line of the Houmas grant thus fixed by the court, the deputy was required to proceed just as in the Dupard grant; said the instructions (Record, p. 30): "Such back line will be run by you parallel with and 80 arpens from the river *as it existed in the year 1777*, the date of the grant of the additional 40 arpens of the Houmas grant (as construed by the court). *In ascertaining if any changes have occurred in the bank of the river within that time, and if so, their extent, you will be governed generally by the instructions as to the south shore of Lake Maurepas* and those contained on page 111 of the surveying manual.

If you are not well satisfied that material changes have taken place you will proceed upon the assumption that the river runs now as it did then and locate the back line accordingly."

When the Commissioner approved the instructions as to the Dupard grant, as he told the Surveyor General, in his letter of March 4, 1890, he had done (Record, p. 33); and when the Secretary approved them, as the Surveyor General in his supplementary instructions of 24 February, 1890, said he had done (Record, p. 32), each approved in full and without reserve the rule laid down, as we have seen, for the survey of the Houmas back line. If, therefore, the rule was so bad when applied to the one grant why was it not bad when applied to the other?

Why was not the surveyor told to run the *Houmas back line* 80 arpens from the river bank as it was when he should make his survey when he was told to run the back line of Dupard from the lake shore, as it was when he should make *that* survey?

In the Dupard grant the survey had been made, examined, paid for, and approved, six months before, and the Assistant Secretary knew it; while the Houmas survey had not been begun, which fact he knew, or could easily have found out. The truth is, that the river in front of the Houmas grant has since 1777 caved in enormously, being

at the bottom of a bend, and the line finally run by Mr. Paine as parallel with the stream and *then* 80 arpens from it is now much nearer. Yet this part of the work has not been questioned, has been duly approved by the Surveyor General, and the township plats exhibiting it have not been withheld from filing in the office of the Register and Receiver! Why this distinction? Will the Department send the Deputy back there to run a new line, as it finds so necessary to justice in our case? "Consistency thou art a jewel."

We proceed now to what is really the hinge of the case: it involves the jurisdiction of the Circuit Court to restrain by injunction the making of the new survey and the obliteration of the old. And we state it thus:

When the public survey contemplated by the decision of 1888 had been executed according to its terms and had been examined, found correct, and paid for and approved by the officer authorized by law to approve it, had not the Land Department reached the final point in the proceedings beyond which it could not go?

And this must be determined, in the particular case, as we have said before, by the *nature* of the act to be performed and the *power* of the officer performing it. We will examine both together.

In McDonogh *vs.* Millaudon (3 How., p. 705), the former held under the Dupard grant, and it was decided by the court that it was a perfect French grant, protected by the treaty of 1803 as such, and required no confirmation by Congress or any court or commission acting under authority of Congress to give it validity. Said the court (p. 705): "Dupard's grant was *completed as early as 1769*, and presented to the register and receiver as a *complete title;* was thus reported on by them to the General Land Office, and by that department the report was laid before Congress. It is as follows:

"No. 406. John McDonogh & Company claim a tract of land situated in the county of Acadia, on the east shore of the River Mississippi, sixteen leagues above New Orleans, containing thirty-two arpens front, *with a depth extending as far as* Lake Maurepas.

"This tract of land has formerly been claimed before the Board of Commissioners, and the depth extending beyond forty acres, rejected by them for want of evidence of title; but the claimant has since produced *a complete French title to the whole quantity claimed* in favor of Pierre Delille Dupard (under whom he claims), dated 3rd day of April, 1769."

"On the report at large, embracing many claims, Congress proceeded and by the act of May 11, 1820, declared 'that the claims to lands within the eastern district of Louisiana, described by the register and receiver of said district in their report to the Commissioner

of the General Land Office, bearing date the 20th day of November, 1816, and recommended in said report for confirmation, be, and the same are hereby confirmed, against any claim on the part of the United States.'"

"McDonogh's claim, No. 406, is of class first, species first, in the report, including twenty-one grants, of which the register and receiver say: 'All the preceding claims, being founded on *complete titles*, are in our opinion confirmed by law.' 3 Am. State Papers, 255. This is explained on page 267 where it is again said: 'Those claims which are found under species first of the first class, *being founded on complete grants of former governments, we think are good in themselves on general principles, and, therefore, require no confirmation by the Government of the United States to give them validity.*'"

"Many incomplete titles were recommended for confirmation and confirmed by Congress, but in these cases the former governments had not parted with the ultimate interest in the land, and the fee was transferred to the United States by the treaty, with the equity attached in the claimant, which equity was clothed with the fee by the confirming act. The *perfect title of McDonogh being clothed with the highest sanction, and in full property* on the change of governments, an assumption to confirm it would have been pregnant with suspicion that it required confirmation by this government, in addition to the general law of nations and the treaty of 1803, which secured in full property such titles. That the grant stands *recognized as complete and valid* against the United States, and any one claiming under them by the proceedings had before the register and receiver and by Congress, we have no doubt; further than this the government has not acted on it."

On page 704 the court had thus described the grant. "Dupard's was made in 1769, '*for thirty arpens of front to the river Mississippi, upon the whole depth that shall be found, unto lake Maurepas, of the land where heretofore were two villages of the Callipissa savages; to take from the plantation of one Allemand, unto its junction with that of a person named Joseph Lacombe.*'"

In Secretary Lamar's judgment of 1888, (Record, p. 19; 6 L. D. 476), he refers to this decision, and his own rests on the idea that the original grant was a perfect French grant and that no legal or equitable right to the land passed to the United States under the treaty by which they acquired the province containing it. The whole history of the grant, legislative, executive and judicial, fortifies this ruling, and if anything is settled in connection with it it is that the United States took no interest in the lands under their deed of cession, but assumed under that deed the obligation to respect and protect it as private property. (Maguire *vs.* Tyler, 8 Wall. 652; United States *vs.* Wiggins, 14 Pet. 334; Fremont *vs.* United States, 17 How.

542; Decision of Secretary of the Interior of January 5th, 1871, in Daniel Clark and Gaines case, and mass of authorities cited: Copp's Public Land Laws, p. 500, etc., ed. of 1875.)

In Blanc *vs.* Lafayette (11 How. 104), the Court held, that the claim of Louis Liotau, contained in the same class and in the same report with that of McDonogh, had not been confirmed by Congress under the Act of May, 1820 (3 Stats. 573), because the board of commissioners considered it as not requiring confirmation.

And in Ledoux *vs.* Black (18 How. 473), on writ of error to the Supreme Court of Louisiana, involving the claim of Booligny, contained in the same report of the same commissioners as the McDonogh claim under Dupard, both courts carefully avoided the admission that the Act of 11 May, 1820, had confirmed it. It would seem, therefore, that the true status of the Dupard grant at the time of Mr. Lamar's decision, as recognized by his department and the courts, was that of a title to land created by the deed of France of 1769, and secured by the pledge of the treaty of 1803, and requiring no congressional confirmation to entitle it to protection in the courts. It stood upon a like footing with other property. If this be so it would seem quite useless to argue to this Court that such a grant, thus guaranteed and protected, required from the proper department anything more than such ascertainment as would effectuate the pledge contained in the treaty. It is true that Congress, by the two laws acting upon the reports of the Commissioners on the McDonogh and Fontenot claims, (the former being for the upper four-fifths of the Dupard title, and the latter for the lower fifth), (Secretary Lamar's decision of 1888, Record, bottom of p. 23), further recognized the grant under which those persons deduced their rights; but those laws took nothing from the recognition and pledge contained in the treaty, but rather strengthened them. They are to be deemed as recognitions by the government of derivative rights in favor of McDonogh and Fontenot as assignees of Dupard, and as therefore entitled by law to the same protection he was entitled to by the treaty. This will appear by a brief review of the laws themselves.

McDonogh (as shown in Mr. Lamar's decision, Record, p. 23), filed his claim before the board under section 2 of the act of February 27, 1813, (2 Stats. 807). This action was *permissive* only and not *required* by the law; the language of the section being: "That every person or persons who had filed his or their notice of claims to land, &c., * * * * *shall be allowed* until the first day of January next to deliver the written evidence, or other testimony, in support of his or their claims, &c." And the only penalty for not so doing was thus denounced:

"And the right of any such persons neglecting to deliver the evi-

dence of their claims, as above mentioned, shall become barred and void *in so far as the same is derived from the United States*, and the evidence thereof be incapable of being admitted in any court whatsoever against any grant derived from the United States."

The response of Congress to this claim, thus filed and supported, is in section 1 of the act of May 11, 1820 (3 Stats., p. 573): "That the claims for lands, etc., described by the register and receiver, etc., be, and the same are hereby, confirmed against any claim on the part of the United States."

It will be seen this law requires no survey, no certificate of confirmation, and no patent. And no other law required a patent to issue, or a plat to be certified, or a certificate to be granted, or any other thing whatsoever done to complete, protect, or evidence the right of either claimant, McDonogh or Fontenot. If any such law can be produced, we ask our adversaries to produce it. We are not bound to prove a negative.

It is true, as we shall see, that the Surveyor-General had authority, and it was his duty, under the laws relating to private land claims, to survey the grant, or its derivative parts thus recognized by law; but his duty and power extended no further.

The Fontenot claim was preferred before the board under the *permission* granted by section 4 of the above act of 1820, which recognized the McDonogh title. The language is that persons in his situation "*may*" file their claims and evidence, not *shall* or *must* do so. And the only penalty for not doing so was the same as that denounced against McDonogh, as we have seen, by the act of 1813.

The Fontenot claim, thus filed and supported, was reported to Congress January 6, 1821 (3 Am. State Papers, p. 511, Duff Green's Ed.), and was confirmed by section 1 of the act of February 28, 1823 (3 Stats., p. 727), "against any claim on the part of the United States." No survey was required, no certificate, and no patent, and no subsequent law has ever required a patent to divest the United States of any interest in the land. It is true that the subsequent act of December 22, 1854 (10 Stats., 599), *allowed* patent to issue both on this claim of Fontenot and that of McDonogh, *if* they had been technically "confirmed by law" before that time, a thing we have seen the department and the courts seem to have denied. But the act did not *require* patents to issue, and if issued, they could only operate as mere quit claims, estopping nobody but the United States. This act of 1854 is now section 2447 of the Revised Statutes. Thus it appears that when the question arose before Secretary Lamar as to the proper boundary of the Dupard grant in the rear, that question being the only one he considered then open, he was performing a quasi judicial function, and, under the rule, "*id certum est quod cercertum reddi potest*," was performing the only duty imposed upon

his department by the law, that of ascertaining the land held under the grant and treaty, for the sole object of protecting it.

If we have succeeded in showing that the construction put upon his decision was erroneous it must needs follow that what he intended to be done had been fully and regularly done, for it is nowhere asserted or pretended by Mr. Chandler, or the Commissioner, or the Surveyor-General, that the back line of Mr. Paine was not correct in itself and the proper execution of the decision of 1888 if by that decision the Department intended that it should run from the shore as it was at the date of the grant. On the contrary, the record abundantly shows that "it is just such a back line as those officers themselves would now run if no survey at all had ever been made and they were proceeding to execute the decision by a line run from the shore as it was in 1769. It is important to observe that those officers accept the proof that the lake had changed in 130 years, that the surveyor had correctly ascertained the extent of the change, and had correctly done his work under his contract and instructions. Their only ground of opposition to it at all is that it starts from an initial point not meant by the grant or Mr. Lamar's construction of it. If it starts from the point the grant and he intended they have no quarrel with it! This is the clue to their action. By the letter of the Commissioner to the Surveyor-General of May 21, 1891, (Record, p. 37) referring to the line in question he states:

"This line was run by Deputy Surveyor Ruffin B. Paine, under his contract No. 1, dated November 11, 1889, under instructions of your predecessor, and was accepted by this office to the extent of payment for the work, it having been done in accordance with his instructions; *but the plats were withheld from filing*, awaiting the decision of the department as to the correctness of the instructions in view of the original decision of the department in the case, dated January 6, 1888 (6 L. D. p. 473).

"It is unnecessary to enter into the details of the instructions issued by your predecessor, or of the work performed by his deputy in pursuance thereof, as they form a part of the files of your office and you are no doubt familiar with them. It is sufficient to state that the enclosed decision directs that the *southern shore of the lake as it now exists* shall be fixed absolutely as the starting point to determine the back line of the aforesaid claims.

"*This necessitates* the rejection of the survey executed by Paine as to the establishing of this line, and you will enter into a new contract with some competent deputy for its establishment as now directed by the department."

It was contended in argument below, and will probably be here, that this withholding of plats was the retention by the officers of the Land Department of the whole matter of the survey of the

back line, including the power to go on making and unmaking and making again, locations and surveys of the same, so long as might be agreeable or convenient; and that until they ceased to *assert* any jurisdiction over the subject, the courts of justice could not deal with it. As the filing of the plats in the local land office at New Orleans was the only act or thing in or about the business left to be done or proposed to be done by the department after the approval of the survey, the respondent saw the necessity, if he would deny the jurisdiction of the circuit court on the ground that the matter was still under its lawful control, of showing that such further act was a lawful necessary act, authorized by law, and which the Land Department alone could perform, and which, until performed and finished, worked the retention by that department of the whole matter of the survey of the grant. Of course, if that were good law, the court could not interfere by injunction to restrain the new survey however much it might think it intrinsically wrong. The court and the department, both, cannot have jurisdiction. One or the other has it. It is not concurrent. It is exclusive.

Let us see if it is good law. We hold that the law conferred no authority on the commissioner or any other officer to file the approved plats of McDonogh & Fontenot with the register and receiver, and therefore none to withhold such plats from filing in said office.

The office of Surveyor-General for Louisiana was created by the Act of March 3, 1831 (4 Stats., p. 492), and its first section conferred the same authority and imposed the same duty over private land claims "as are now vested in and required of the surveyor of the lands of the United States, south of the State of Tennessee, or the principal deputy surveyors in the said State."

The "Surveyor of the lands of the United States south of Tennessee," was the then Surveyor-General of Mississippi, whose office was created and powers and duties imposed by the Act of March 3, 1803, Sec. 10, (2 Stats., 229), and the principal deputy surveyors referred to were two in number and were authorized to be appointed by section 9 of the Act of 21st April, 1806, (2 Stats., 391), one for the part of Louisiana east of the Atchafalaya and south of Red River, and the other for the part west of the Atchafalaya and north of Red River.

By Act of March 2, 1805, (2 Stats., 324), a board of three land commissioners was provided for each of the above districts, who, under the supplemental Acts of 28th February, 1806, Sec. 3, (2 Stats., 353), April 21, 1806, Sec. 9, (2 Stats., 393), March 3, 1807, Sec. 7, (2 Stats., 441), and March 3, 1811, Secs. 2 and 5, (2 Stats., 662), exercised entire jurisdiction of receiving, examining, surveying, confirming and reporting to Congress all land claims in Louisiana. They exercised their duties and powers until 1811, when, by section 3 of the Act of March 3 of that year (2 Stats., 662), land offices were

provided to be opened in each of the three land districts created by the act, and a register and receiver was provided for each. After this date these registers and receivers in each district, from time to time, under different laws, exercised the former powers and duties of the commissioners under the acts we have cited. An examination of all these laws, prior to the Act of 27th February, 1813, (2 Stats., 807), under which we have seen McDonogh filed his claim, will show that the principal deputy surveyors had no authority to make any surveys of private claims save such as the commissioners should direct. And section 3 of the Act of 28th February, 1806, while devolving this power and duty upon them, declared that all such surveys shall "be held and considered as private surveys only," "those of the above-mentioned *legal and complete* titles only excepted." The next law on the subject was that of 21st April, 1806, (2 Stats., 391), but there is nothing in it to vary the matter. By the next law, that of March 3, 1807, (2 Stats., 440), large powers were given to the commissioners by section 4, who thereafter granted confirmations, final against the United States, and needing no approval by Congress, in certain claims not exceeding a league square.

In such claims, thus finally confirmed by the "old boards," as they were called, Sec. 6 required them to issue to each claimant, a certificate, called a certificate of confirmation, and to file with the principal deputy surveyor of the district an abstract of the favorable decision thus carried into execution by the issue of the certificate. Sec. 7 then made it the duty of such surveyor to survey the claim, according to the abstract of the decision, or to re-survey it if necessary, and to file with the register of the land office for the district containing the claim, special and separate plats for each claim, and general and connected plats of all the claims. This having been done, Sec. 6 made it the duty of such register to issue *his* certificate in favor of the party, "which certificate, being transmitted to the Secretary of the Treasury, *shall entitle the party to a patent.*" This certificate of the register was called the "patent certificate." Such was the practice, as we have stated, under all the laws up to the abolition of the "old boards," and the substitution of the registers and receivers, as commissioners, beginning, as we have seen, in 1811. It is obvious that these laws, notably Secs. 6 and 7 of this leading Act of 1807, only required the plats of survey of claims to be filed in the local land office (then as now known as that of the register and receiver), as a basis for the issue of their patent certificate, on which the Secretary of the Treasury was directed to issue the patent. It is equally clear that the requirement had no application to any claim on which the register was not authorized or required to issue his patent certificate, and on which no law authorized or contemplated any patent. But even if it were otherwise, it is plain

the claims of McDonogh and Fontenot were filed before the register and receiver, under the Acts of 1813 and 1820, long after the old boards had been dissolved. And unless the respondent can show that those laws made it the duty of the then principal deputy surveyor for the eastern district, to file the plat of those claims in the office of the register and receiver, supposing he had then surveyed them, it must be deemed that it was not his duty, and that therefore such duty did not devolve upon his successor, the Surveyor-General, under the Act of 1831 creating his office. It may be replied that Sec. 3 of the Act of 1813 gave the *register and receiver*, as to the McDonogh claim, the same powers, and imposed the same duties as the *commissioners* would have had if McDonogh had filed his claim before them, with the exception, as stated in the section, that they could not confirm it. But the question is not what was the duty or power of the *register and receiver*, as a board of commissioners, with respect to the claim, but what were the duties and powers of the *principal Deputy Surveyor* over the claim and the plat of survey?

Under the old boards the *commissioners* never filed the plats of surveys with the register. That duty devolved upon the principal deputy surveyor exclusively. Consequently, as neither the Act of 1813, under which McDonogh filed, nor the Act of 1820, under which his claim was recognized and that of Fontenot filed, nor the Act of 1823, under which Fontenot's claim was recognized, devolved any such duty or power upon such surveyor, it must follow that the Act of 1831 did not devolve such upon the Surveyor-General. And, unless it can be shown that some later law has done this, it must follow that neither the Surveyor-General, nor the Commissioner of the General Land Office had such authority, or was subjected to such duty, when the latter assumed to exercise it in the year 1891. The closest examination of those laws of 1813, of 1820 and of 1823 will fail to show any duty or authority on the part of the officer then exercising the duties afterwards devolved upon the Surveyor-General, allowing or requiring him to file with the register and receiver the plats of survey of any claims within the purview of those acts. And the reason is manifest. As those laws did not contemplate the issue of patents or any patent certificates or any other evidence of title on such claims, there was no reason why the plats should be filed there.

Nor do the laws creating the General Land Office or the Interior Department give such power or duty to the Commissioner or the Secretary. See Act of 25th April, 1812, Sec. 1 (2 Stats., p. 716), creating the office of Commissioner; the Act of July 4th, 1836, Sec. 1, reorganizing it (5 Stats., p. 107), and the Act of March 3, 1849, Sec. 3 (9 Stats., p. 395), creating the Interior Department.

The error of the respondent in contending that the Surveyor-General or the Commissioner had authority to file the plats of survey with the register and receiver grows out of confounding the *special* or *particular plats* of claims with the township plats representing the surveys of the public lands. Originally, as we have shown, in the old laws relating to the confirmation of claims by the old boards of commissioners, the surveys of private claims were made by a surveyor who surveyed and returned them alone, and who had nothing to do with the contemporaneous surveys of the adjacent public lands. On the return of *such* surveys the principal deputy surveyor constructed and approved the special plat of survey of the particular claim. But as years rolled on and nearly all the claims had been so surveyed, it became usual for the Surveyor-General in letting contracts to his deputies for the survey or re-survey of the public lands to include in the contracts authority to survey and return at the same time all private claims entitled to survey found by the deputy within his field of operations. In such cases the Surveyor-General compiled from the deputy's returns the *special plats* of the claims and *also* the township maps of the public land surveys. But since the claims were situated in such townships also, they, too, had to be represented on the *township* plats, and it often happened in extensive claims, like that of Dupard, that one claim embraced parts of several different townships. The bill in this case states that Dupard's grant as finally surveyed by the respondent, embraced parts of five townships.

The map of *each* of these five townships, compiled from the field notes and returns of Mr. Paine, represented the *part* of the claim situated in it, on which part the public land surveys in such townships had been closed. Of course all these plats, taken together, bodied forth the survey and representation of the grant. Taken all together, or separately, they were not the special or particular plat of the grant contemplated by law as the basis of, and to be incorporated into the patent, if any patent at all had been directed to be issued. Consequently, the filing or refusal to file *such* plats in the local land office had relation to and affected the public lands alone, and could have no relation to, or effect upon the Dupard grant, or its derivative parts claimed by McDonogh & Fontenot. But there is no *express* warrant of law authorizing the Commissioner or the Surveyor-General even to withhold from the local land offices the approved township maps of the surveys of the public lands.

Of late years such a practice has grown up, based on administrative convenience, in order that entries and locations of the *public* lands may not be allowed until every question has been settled which might jeopardize such entries. But even this practice has no application to the case of *private land claims* which, when surveyed

and represented on the township maps, are not subject to disposition by the register and receiver.

If we have succeeded, therefore, in showing that the law did not *require* the Surveyor-General or the Commissioner to file the approved plat of the survey of the Dupard grant in the local land office, and that, therefore, their withholding it from such filing did not constitute a lawful retention by either, of any control or authority over the plat or grant, then the following authorities show that the courts have jurisdiction to review and pass upon the subject matter and to protect private rights against misconstruction of the law by such officers:

In the United States *vs.* Schurz, 102 U. S., 378, the Court by *mandamus* enforced the delivery of a patent for public land on the ground that when it had been written, signed, sealed and recorded, the proceedings had reached that point contemplated by law as the final step in the investiture of the right in the citizen, and that the executive authority could not after that retain any control over the subject matter. The meaning of the Court is well expressed on p. 402: "From the very nature of the functions performed by these officers, and from the fact that a transfer of the title from the United States to another owner follows their favorable action, it must result, at some stage or other of the proceedings, their authority in the matter ceases."

"It is equally clear that this period is, at the latest, *precisely when the last act in the series essential to the transfer of title* has been performed. Whenever this takes place the land has ceased to be the land of the government; or, to speak in technical language, the legal title has passed from the government, and the power of these officers to deal with it has also passed away."

The Court then proceeds to inquire when the final act had been reached, in that case, and it must be remembered they were considering a title which, as all conceded, could only be consummated by the patent of the United States, because, as had been previously said, the land had been the public land of the United States, entered as such, and as to which nothing but the patent could pass the title. For the distinction between the cases where the patent of the United States conveys title and those in which it is only evidence of title previously vested by law or treaty, see the leading case of Langdeau *vs.* Hanes, (21 Wall. 529), where Justice Field so forcibly presents it. On p. 529 it is said: "In the legislation of Congress a patent has a double operation. It is a conveyance by the government when the government has any interest to convey, but where it is issued upon the confirmation of a claim of a previously existing title it is documentary evidence, having the dignity of a record, of the existence of that title, or of such equities respecting the claim as

justify its recognition and confirmation. The instrument is not the less efficacious as evidence of previously existing rights because it also embodies words of release or transfer from the government."

And again, p. 530:—"A legislative confirmation of a claim to land is a recognition of the validity of such claim, and operates as effectually as a grant or quit claim from the government. 'A confirmation,' says Sheppard, in his Touchstone of Common assurances, 'is the conveyance of an estate, or right, that one hath in or unto lands or tenements, to another that hath the possession thereof, or some estate therein, whereby a voidable estate is made sure and unavoidable, or whereby a particular estate is increased and enlarged.' If the claim be to land with defined boundaries, or capable of identification, the legislative confirmation perfects the title to the particular tract, and a subsequent patent is only documentary evidence of that title. If the claim be to quantity and not to a specific tract capable of identification, a segregation by survey will be required and the confirmation will then immediately attach the title to the land segregated."

In Moore *vs.* Robbins (96 U. S., 530), the very point now before the court was decided. We ask for it a perusal. Bunn had a preemption right to certain land (pp. 534 and 535) and he was permitted by the local officers to make proof and payment, and they issued to him their certificate. But Mitchell had previously bought and paid for part of the land at a public sale and received the receiver's receipt, the usual evidence of his equitable title. In a contest between Bunn and Mitchell before these officers they decided in favor of Bunn, and on appeal the Commissioner decided in favor of Mitchell, and on appeal to the Secretary that officer decided in favor of Bunn, thus affirming the local decision of the register and receiver. *No patent ever issued to Bunn or to Mitchell*, yet neither right, under the law creating it, was complete without patent. In this status of these rights, a brother of Bunn, to whom he had mortgaged the land, brought a bill for foreclosure in a local court in Illinois, making the vendee of Mitchell a defendant. The Supreme Court of that State held that the decision of the Secretary of the Interior in favor of Bunn was, "not only conclusive on the Department, but that it also excludes all inquiry by *courts of justice into the right* of the matter between the parties" (p. 535). But this court reversed that court, saying (p. 535): "The whole question, however, has been since that time very fully reviewed and considered by this court in *Johnson* vs. *Towsley*, 13 Wall., 72. The doctrine announced in that case and repeated in several cases since, is this:"

"That the decision of the officers of the Land Department, made within the scope of their authority, on questions of this kind, is in general conclusive everywhere, except when reconsidered by way of

appeal within that department, and that as to the facts on which their decision is based, in the absence of fraud or mistake, that decision is conclusive even in courts of justice, when the title afterwards comes in question. But that in this class of cases, as in all others, there exists in the courts of equity the jurisdiction to correct mistakes, to relieve against frauds and impositions, and in cases where it is clear that those officers have, *by mistake of the law*, given to one man the land which on the undisputed facts belonged to another, to give appropriate relief."

And the court added:

"In the recent case of *Shipley et als.* vs. *Cowan et als.* (91 U. S., 340), the doctrine is thus aptly stated by Mr. Justice Field: "The officers of the Land Department are specially designated by law to receive consider and pass upon proofs presented with respect to settlements upon the public lands, with a view to secure rights of pre-emption. If they err in the construction of the law applicable to any case, or if fraud is practiced upon them, or they themselves are chargeable with fraudulent practices, their rulings may be reviewed and annulled by the courts when a controversy arises between private parties founded upon their decisions; but, for mere errors of judgment upon the weight of evidence in a contested case before them, the only remedy is by appeal from one officer to another of the Department."

"Applying to the case before us these principles, which are so well established and so well understood in this court as to need no further argument, we are of opinion, if we take as proved, the sufficiency of the occupation and improvement of Bunn as of the date which he alleged, his claim is fatally defective in another respect in which the officers of the Land Department were *mistaken as to the law which governed the rights of the parties, or entirely overlooked it.*"

And the court added (p. 537): "The record in this court shows that, while Bunn's pre-emption claim comes directly within the provision of both statutes, *they were utterly disregarded in the decision of the Secretary of the Interior, on which alone his case has any foundation.*"

Under the laws and decisions it is plain that the proceedings in neither of these cases had reached such a point that the Land Department could exercise no further control over such proceedings. On the contrary, the court (p. 535), says: "But no patent was issued to Mitchell. * * * And the secretary, therefore, had authority, undoubtedly, to decide finally for the Land Department who was entitled to the patent. And, though no patent has been issued, that decision remains the authoritative judgment of the department as to who has the equitable right to the land."

But, in the *exercise* of this jurisdiction, the department *misconstrued the law*, founding the right of the citizen, and therefore the court gave relief, on the principles of the leading case cited, of John-

son *vs.* Towsley (13 Wall., p. 72). It may be said, and probably will be said, that these principles were announced in a case, in which the courts had undoubted jurisdiction to pass upon the acts of the secretary, and that they have no application to a case in which interference by injunction is asked. But there is no force in the suggestion. The result of the judgment in Moore *vs.* Robbins was to give to Mitchell the land the secretary had decided should go to Bunn and which we have the right to assume he would have patented to Bunn. The clue to the action of the court is found in the assumption, more clearly expressed (in Johnson *vs.* Towsley), that the secretary would, *if he had rightly understood the law*, have decided, not for Bunn, but for Mitchell. And in the case at bar the court must likewise assume that had the assistant secretary understood the law, in other words, had he properly construed his predecessor's judgment, he would not have tried to reverse it and give to the State of Louisiana land which, but for such error, he would have given to New Orleans.

He misapplied the law, as the secretary did in Moore *vs.* Robbins, and in Johnson *vs.* Towsley, and for that error the courts must interfere and do what it must be assumed he would have done had he been, like a court of justice, learned in the law and fitted for expounding it. The line of cases relied on by the Court in these two leading cases will unfold more fully the principles we rely on. Space does not enable us to refer to them *in extenso*. Suffice it to say that the case of Snyder *vs.* Sickles (98 U. S. 203), and Craigin *vs.* Powell (128 U. S. 691), relied on by respondent in the lower courts, have no application to this question. And we have examined the mass of the cases cited by the Court in the latter case (on p. 699), and we fail to find one in which this precise question arose. It is true that in many of these cases there is much said, in a general way, about the want of jurisdiction in the courts to interfere by *mandamus* or injunction, while the matter is yet lawfully within the control of the land department. But in every case the facts will be found to differ widely from the case at bar.

In Stanford *vs.* Taylor (18 How., p. 409), plaintiff in ejectment claimed land under confirmation of an inchoate grant so general in its calls and description as to attach to no specific land, and this infirmity was not cured by the confirmation. The approved federal survey placed the land on the west of the previously surveyed and well known claim of Louis Robert, while plaintiff sued for the land on the *east*, repudiating the survey which defendant offered in evidence to prove location and defeat the action. The court simply held that the claim, unaided by survey, attached to no land, and that as the plaintiff repudiated his own survey he could not by parol evidence attach his title to other lands. And in Snyder *vs.* Sickles

(98 U. S., p. 203), the same claim came before the court under a new survey, expressly authorized by the Secretary of the Interior, embracing the land on the east of the Robert survey, and which was that claimed by the plaintiffs in both suits. But it appeared that this later survey had been expressly repudiated by the Secretary, who had authorized it, because "upon examination it was found that it did not conform to the calls of the grant required by the order of survey, and that the survey being upon land *not granted*, no effect will be given to it by the department." (Pp. 207-208). And it was this power of the Secretary thus to reject the survey *he* had ordered that the court sustained.

In Craigin *vs.* Powell (128 U. S., p. 691), the decision is more for us than against us. It involved no private land claims at all, nor the surveys of such claims.

Plaintiffs held under State titles founded upon a corrective public land survey of a township originally surveyed by the United States in 1837, and defendant held under patents of the United States issued in 1844 for public lands sold according to such old approved survey. The effect of sustaining the plaintiffs' right would have been to correct or annul, *pro tanto*, the official survey. This the circuit court thought could be done on the proof of its errors, and because the patents and other evidences of defendant's right in no way, by their own intrinsic proof, attached it to the particular lands claimed by him. But it was held by this court on appeal to be a universal principle in public land patents that the surveys, field notes, etc., on which the sales had been made and on which the patents had issued, were to be deemed, for purposes of description and identification of the land, incorporated into the patents themselves.

In referring to the general power of control over the public land surveys by the Land Department the Court says, p. 699: "It is conceded that this power of supervision and correction by the Commissioner of the General Land Office is subject to necessary and decided limitations. Nor is it denied that, when the Land Department has once made and approved a governmental survey of *public lands*, (the plats, maps, field notes and certificates all having been filed in the proper office), and has sold or disposed of *such* lands, the courts have power to protect the private rights of a party who has purchased, in good faith from the government, against the interference or appropriations of corrective re-surveys made by that department subsequent to such disposition or sale." Thus the Court sustains our case, for surely what respondent seeks to do is to make a corrective survey long after the former one has been made and approved and long after the right of the citizen had attached in pursuance of such survey.

Recurring again to the cases cited in Craigin *vs.* Powell, on p. 699; it is plain that Steel *vs.* Smelting Co., (106 U. S. 447), has no sort of application to the case at bar.

In United States *vs.* San Jacinto Tin Co. (125 U. S., 273), the decision is rather for us, in so far as it sustains a private grant survey, attacked for fraud, because, after full examination, the Secretary of the Interior had sanctioned it.

United States *vs.* Throckmorton (98 U. S., 61), has no application at all; nor has Henshaw *vs.* Bissell (18 Wall., 255).

Stanford *vs.* Taylor we have considered. In Haydel *vs.* Dufresne (17 How., 23), the State Court had in 1854 disregarded an approved public land survey in 1831, and patent issued on it in 1845, and decreed part of the land to another who claimed a prior and superior equity. *Held*, that the courts could not thus change lawful and approved ancient surveys.

In West *vs.* Cochran (17 How., 403), it was held, as in Stanford *vs.* Taylor, that an indefinite inchoate grant, although confirmed by a board of commissioners, unaided by an approved survey by the competent authority, could not be the basis for recovery in ejectment. The same grant came before the court again in 1 Black, 195, and the same ruling was made.

Jackson *vs.* Clark (1 Pet., 628), has no application; and Nismanger *vs.* Saunders (1 Wall., 424), very much like it, has none.

Snyder *vs.* Sickles (98 U. S., 203), we have referred to.

In Frasher *vs.* O'Connor (115 U. S., 102), it was held that, under the exceptional and large powers conferred on the Surgeon-General of California, by section 8 of the Act of July 23, 1866 (14 Stats., 218), "to quiet land titles in California," the approval by him of a township plat, exhibiting public lands and a private claim, and the filing of the same in the local land office, made the lands excluded from the claim liable to disposition as public lands, and that previous approval of the plat by the Commissioner of the General Land Office was not necessary. This ruling has no application, and if it had, the special law under which all was done would rob it of all value as an authority.

Gazzam *vs.* Phillips (20 How., 372), has no sort of application; nor has the case of Pollard *vs.* Dwight (4 Cranch, 421); nor that of Taylor *vs.* Brown (5 Cranch, 234); nor McIver *vs.* Walker (9 Cranch, 173); though it is probable Secretary Lamar had the rule of location laid down in this last case in view when he held Lake Maurepas was called for in the Dupard grant, not as a boundary, but as an initial point by which to fix the depth. The case of Craig *vs.* Bradford (3 Wheat., 594) has no application. And in Elliott *vs.* Pearl (10 Pet., 412), the last in the list, the only point ruled on in the remotest manner affecting the case at bar, is that if a public surveyor adds to his returns matters "not strictly within the scope of his functions, they cannot be put in evidence."

It is contended by respondent that the assertion by the General Land Office that its legitimate control over the survey and grant has not terminated should oust or deny the jurisdiction of the Court to examine the grounds on which the assertion is founded. But in United States *vs.* Schurz, (102 U. S. 378), and in the Arlington case, United States *vs.* Lee, (106 U. S. 197), the executive authority interposed the same defense—the Secretary of the Interior in the first, contending that *by refusing or failing to deliver the patent* he retained control of the matter and the courts could not interfere; and the real defendant, Kaufman, in the second, that he held possession of the land sued for, as an officer of the army, and under the order of the President, and that *therefore* the Court could not enquire into the rightfulness of that possession or the validity of the order.

But in each case the Court, to enforce justice and to protect private rights, enquired into the merits of the defense and assumed and exercised jurisdiction.

If the injunction goes in this case it is to protect the true judgment of the executive authority and not to thwart or oppose it; to restrain from execution a supplemental judgment which it is obvious would not have been made if the officer making it had correctly interpreted the former judgment. For this error of law, if carried into execution, it is plain relief can be had in ejectment. But as the bill shows such relief would be merely nominal, why should not equity enjoin what law would correct after the act was done?

High on Injunctions, section 1309, lays down the principle we invoke:

"In applications for relief by injunction against the acts of public officers the determining point is, ordinarily, whether they are acting within the scope of their authority or whether they are transcending that authority. And, while equity will not interfere while such officers are acting within the authority conferred upon them by law to determine whether their action is good or bad, yet, if they assume powers over property which do not belong to them and infringe upon or violate the rights of citizens under pretense of such assumed authority, equity has jurisdiction to interfere for the protection of the citizen." In support of this general doctrine the author cites the case of Foster *vs.* Hornsby, 2d Irish Chancery, p. 426. In that case an injunction went out restraining Commissioners of Drainage from recording a final award for expenses of certain works, against which, when recorded, no relief could have been had at law, it appearing they acted in excess of the authority conferred by Parliament. The Master of the Rolls, speaking to the general objection to the jurisdiction, cited the opinion of Lord Cottonham in Frewin *vs.* Lewis (4 M. & C., p. 254): "Now, I apprehend that the limits within which this court interferes with the acts of a body of public

functionaries, constituted like the Poor-Law Commissioners, are perfectly clear and unambiguous. So long as those functionaries strictly confine themselves within the exercise of those duties which are confided to them by the law this court will not interfere.

"The court will not interfere to see whether any alteration or regulation which they may direct is good or bad; but if they are departing from that power which the law has vested in them, if they are assuming to themselves a power over property which the law does not give them, this court no longer considers them as acting under the authority of their commission, but treats them, whether they be a corporation or individual, merely as persons dealing with property without legal authority. That distinction, which is very obvious, sufficiently explains all the grounds on which this court ever interferes with the acts of bodies constituted as these commissioners are. Many cases have come judicially before me in which I have been called upon to act upon this principle; more especially in the instance of railway companies, canal companies, and other bodies incorporated by acts of Parliament, as to which, while the court avoids interfering with that which they do while keeping within the limits of their jurisdiction, it takes care to confine them within those limits; and if, under pretense of an authority which the law gives them to a certain extent, they go beyond the line of their authority, and infringe or violate the rights of others, they become, like all other individuals, amenable to the jurisdiction of this court by injunction." He added (p. 434): "The case of Spear *vs* Crawter (17 Ves., p. 216), decided by Lord Eldon, is also an authority on this point; and the case of Armistead *vs.* Denham (11 Beav., p. 422), decided by Lord Langdale and affirmed by Lord Cottenham on appeal, clearly establishes that, even if there be a reasonable doubt whether public officers have acted with due regard to the provisions of the acts of Parliament which gives them the authority, an injunction should be granted until answer or further order."

See also High on Injunctions, Sec. 1243, and case cited: Mitchell *vs.* Wiles (59 Ind., 364), where a public officer was enjoined from obeying an illegal town ordinance; Sec. 1309, authorizing injunctions generally where public officers act without authority; Citing Board of Liquidation *vs.* McComb (2 Otto, p. 531), where the board authorized to bond one class of debts of a State, was enjoined from bonding debts of another class on the ground that the latter was not within the law creating it and conferring its powers.

We think it will not be denied the bill presents a strong case for injunctive relief. The facts are not denied. They are admitted by the demurrer (Record, p. 17). After a long, regular and contested course of *quasi* judicial proceedings in a court of competent jurisdiction a definitive judgment is rendered which it is the right of the

citizen to have executed, and which is regularly executed in the only mode provided by law. Nothing remains to be done which the law, or necessity, or custom requires to be done. Thereafter a supplemental ruling is rendered virtually revoking the judgment on the plea of interpreting it in a manner admittedly wrong, and it is seen that if this new interpretation is enforced rights secured under the judgment and its execution must be sacrificed before relief at law can be had. The respondent denies the power of the judicial courts to protect the right, not because the judgment he was enforcing was rendered by a judge having jurisdiction, or is on its merits valid and right, but because that judge *asserts* the exclusive right to retain the whole matter under his control until his reversal shall have become effective! If this mere assertion of a right to reopen the adjustment of a private land claim, on the sole ground of an error in the construction of the decision adjudicating it, committed by those authorized to enforce it, and who have, in fact, enforced it, must place the rights thus disturbed beyond the protection of the equitable writ of injunction, then the question will arise when is this power to re-open and disturb at an end?

When does it determine in the particular case? Can the Secretary of the Interior on his own motion, or on the suggestion of aggrieved parties, at any time reopen any private land claim, and upon his own views of what should have been done, or his construction of what has been done, unsettle the whole matter and throw out, as public land, that which had been adjudged to be private property? If this can be done there is little security to the citizen in lands held under foreign grants once adjudicated and settled by the Land Department.

What other act or thing does the Land Department propose to do with the claims of McDonogh and Fontenot after the new survey shall have been made and approved by the surveyor-general? Will they issue a patent certificate, or special plat, or patent on either? If there is legal authority for this we ask the respondent to show it. What act or thing did they propose to do with those claims, or would they have done with them, or either of them, had not the decision of 1891 been rendered?

The commissioner virtually tells us, (Record, p. 37), he would have authorized the surveyor-general to deliver to the Land Office in New Orleans, (in an adjoining room in the same building with the other) the approved maps of the five townships containing the claims and representing the subdivisions of the public lands binding upon their out-boundaries. And this step, like baptism by immersion, is so big with legal consequence, that unless performed the child born of the grant, the treaty, the law, the decision and survey, is damned!

There was no authority of law, usage, or custom, for compiling from the surveyor's returns separate plats of these claims, for there was no reason for it. It is not pretended they have been compiled or ever will be. And the only reason the parts of those claims within the particular township have been represented on its map is for protection alone and as a guide and basis for the disposition of the adjacent public domain. If there was any other we ask that it be shown in the Government's brief. We ask also that the law or authority be shown, if it exists, under which the Land Department claimed the power to file in the local land office the plats of survey of these claims. We have tried to prove the negative of this, by a tedious range through the old acts under which the claims were filed, reported, recognized, and surveyed. From its very nature the task was hard and the result not conclusive. But under the rules of evidence if we proved a *prima facie* case, it now devolves upon the government to show such power if it does exist. That will be an affirmative, readily susceptible of proof.

It was sought below, and will doubtless be here, to sustain the action of Assistant Secretary Chandler under the general supervisory authority conferred by law upon the Secretary of the Interior over the acts of his subordinates. And the old authorities will be cited, such as Decatur *vs.* Paulding (14 Pet., p. 497), *Barnard vs. Ashley*, (18 How., p. 43), Commissioner *vs.* Whiteley (4 Wal., p. 522), Gaines *vs.* Thompson (7 Wal., p. 347), Secretary *vs.* McGarrahan (9 do., p. 298), Litchfield *vs.* Register (9 do., p. 575).

This supervisory power originated with section 1 of the Act of 25th April, 1812 (2 Stats., p. 716), creating the General Land Office. It is this: "That there shall be established in the Department of the Treasury an office, to be denominated the General Land Office; the chief officer of which shall be called the Commissioner of the General Land Office; whose duty it shall be, *under the direction of the department*, to superintend, execute and perform all such acts or things touching or respecting the public lands of the United States, and other lands patented or granted by the United States, as have heretofore been directed by law to be done or performed in the office of the Secretary of State, of the Secretary and Register of the Treasury, and of the Secretary of War, or which shall hereafter by law be assigned to the said office." Section 1 of the Act of July 4, 1836 (5 Stats., p. 107), reorganizing the General Land Office, declared: "That from and after the passage of this Act the executive duties now prescribed or which may hereafter be prescribed by law, appertaining to the surveying or sale of public lands of the United States, or in any wise respecting such public lands, and, also, such as relate to private claims of land and the issuing of patents for all grants of land under the authority of the government of the United States, shall be sub-

ject to the supervision and control of the General Land Office, *under the direction of the President of the United States.*"

The Act creating the Interior Department of March 3, 1849, (9 Stats., 395), Sec. 3, said:

"That the Secretary of the Interior shall perform all the duties in relation to the General Land Office *of supervision and appeal* now discharged by the Secretary of the Treasury."

These several provisions of law were merged into sections 441 and 453 of the Revised Statutes:

"Section 441. The Secretary of the Interior is charged with the *supervision* of public business relating to the following subjects: * * * Second. The public lands, including mines."

"Section 453. The Commissioner of the General Land Office shall perform, *under the direction of the Secretary of the Interior*, all executive duties appertaining to the surveying and sale of the public lands of the United States, or in anywise respecting such public lands, and also, such as relate to private claims of land, and the issuing of patents for all (agents) grants of land under the authority of the Government."

These provisions do not profess to create duties or power in subordinate officers, but to confer upon the Secretary and commissioner supervision and control with respect to those previously conferred or to be conferred by law. It was the acts of the subordinates of the commissioner which he was empowered to supervise, and those of the subordinates of the Secretary which he was empowered to correct. It was not reasonable that either officer could exercise powers of supervision, or control with respect to any officers except their respective subordinates; hence the law conferred none other. It certainly conferred none with respect to the acts of their equals, or superiors in rank or position. It did not give, nor profess to give, to the Commissioner the power to supervise the acts of other Commissioner, nor to the Secretary the power to supervise the acts of other Secretaries.

If we have heretofore succeeded in showing that the decision of 1888 by Mr. Lamar intended that the southern shore of the lake as it stood in 1769 should control, and the court should think that the decision of 1891 was intended as a construction of that decision and not its reversal, it must follow that such later decision would never have been made if the Secretary of 1891 had agreed with the Secretary of 1888. It follows then that the decision of 1891, truly and fairly considered, was not the exercise of any revisory or corrective power over the acts of subordinates, but the exercise of such a power over the acts of the head of the department. And it is plain no such power has been conferred by law. But whatever was the nature of the power sought then to be

exercised we hold that if it was an abridgment of the rights secured and protected by the former decision, as the same then stood executed and finished, its exercise was illegal, that the subject matter was *res adjudicata*, and beyond the jurisdiction of the department. If it was, then the authorities agree that equity will by injunction protect rights thus sought to be invaded where the usual course of law affords no adequate remedy.

We know full well the flood of general authority, worn and stereotyped, which will be launched upon the court, from Marburry *vs.* Madison down to U. S. *vs.* Schurz, against the jurisdiction in this case. Much of it is plausible, some of it persuasive, but the mass of it, we submit, too deferential in this land of law as against power, to these executive tribunals which control so largely the property of the citizen without possessing the aids and attributes by which justice is administered in the ordinary courts.

The facts of the case show it to be an extraordinary one. We find no fellow to it in the decisions of the Land Department or in those of this court. It is *sui generis* and stands alone. And if this court shall sustain the decree below, refusing to interfere in this case, we would not wish for a better argument in support of the measure long urged upon the Congress to take from these executive officers their judicial powers and vest them in a constitutional court.

Respectfully submitted,

J. L. BRADFORD,
Solicitor for Appellant.

WASHINGTON, D. C., *October 15, A. D. 1892.*

147 U. S. 261

Office Supreme Court U. S.
FILED.
DEC 29 1892
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In the Supreme Court of the United States.

OCTOBER TERM, 1892.

THE CITY OF NEW ORLEANS, APPELLANT,
vs.
RUFFIN B. PAINE, UNITED STATES DEPUTY Surveyor.
} No. 1154.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

WM. A. MAURY,
Assistant Attorney-General, and of counsel for the appellee.

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BRIEF FOR THE APPELLEE.

This is an injunction bill filed by the city of New Orleans for the purpose of enjoining the defendant, a deputy surveyor of the United States, from running and establishing the back line of the Dupard grant according to the instructions of the Land Department of the United States.

The facts of the case, as they appear by the bill (pp. 1–14), are briefly these: The grant in question to Pierre Delille Dupard was made by the proper authorities of Louisiana, then a colony of France, on April 3, 1769, and was subsequently confirmed after the acquisition of the territory of Louisiana by the United States. By

divers mesne conveyances a portion of this grant became the property of John McDonogh, jr., who devised the same, upon certain charitable uses, to the cities of New Orleans and Baltimore, and upon partition made between the said devisees the lands described in the bill fell to the complainant.

It became necessary, of course, that the lines of the grant should be determined by surveys made under the direction of the Land Department of the United States, and, accordingly, the lines of three sides of the grant were run; but, a difficulty having arisen as to the fourth and back line, the subject was submitted to the then Secretary of the Interior (Mr. Lamar), who held that the depth of the grant should be determined by a straight line drawn through the center from the front to the rear, terminating at the point of intersection of a line drawn at right angles thereto, so as to touch the lowest point of the southern shore of Lake Maurepas, and that this would seem to determine accurately the depth "as far back as Lake Maurepas."

"It seems to me," he said, "that this is the only rule by which the depth of this grant can be ascertained in accordance with the terms of the grant. I am, therefore, of the opinion that the depth of this grant only extends as far back as the southern shore of Lake Maurepas, and that the side lines of the grant should not extend farther than that depth. (See Exhibit B of the bill, pp. 26, 27.)

Strangely enough, however, the surveyor-general of Louisiana, in giving his instructions to his deputy, who chanced to be the appellee, with an unaccountable per-

versity, directed him to take evidence as to the location of the shore of Lake Maurepas, and if he found that it had changed since 1769, the date of the grant, or, failing that, if he found that it had a location different from its then location at any time since 1769, he was to run the line according to such location and not according to its then location (See Exhibit C of the bill, p. 28); and this in the face of the fact that the Secretary, in his opinion (pp. 25, 26, Exhibit B), had considered the evidence on that subject and expressly pronounced it unreliable and speculative, and of no value, anyhow, because the depth of the grant could be made certain without resorting to it.

The survey made under these instructions was based upon the perversely erroneous reading of the opinion of Secretary Lamar, already referred to, and the back line of the grant was determined, not by the location of the shore of the lake at the time of the survey, but by *its supposed location* in the year 1769. As to this, however, the deputy surveyor says, "*I can form no definite* conclusion;" still, he says he "*tried to adopt a location which would probably give the claims all the depth they are entitled to without extending them so far as some of the evidence would require*" (Complainant's Exhibit G, p. 34).

It is on this survey, made in apparently premeditated disregard of Secretary Lamar's opinion and resting on a speculative basis only, that the complainant relies, as giving the true depth of the grant.

But although these instructions of November 11, 1889, were contrary to the Secretary's decision and apparently

designed to obstruct it instead of carrying it into effect, yet these very instructions, upon which appellant relies so earnestly, require that the line should be fixed in the identical place which appellant now objects to. For said instructions provide (p. 28) as follows: "If you find no reasons to think the shore has changed, or if the evidence resulting from your examinations and from the other evidence you may obtain is not *satisfactory* on this point or will not enable you to *fix* it in any other position than it now occupies, you will conclude that *its position now* marks its position in 1769, when the grant was made." The deputy surveyor having reported that he "can form no definite conclusion" (p. 34) upon this point, there seems to be no room for controversy as to what ought to be done, even under the perverse instructions referred to.

The bill avers that this survey was approved by the Surveyor-General and forwarded to the General Land Office, and was duly tested, "and thereupon," says the bill, "and in due official course, the said surveys of the said R. B. Paine *were duly paid for by the United States*, including his said survey and location of said back line of said Dupard grant" (p. 9); but presently complainant grows bolder and makes the unfounded and remarkable averment that this survey *was approved* by the General Land Office (p. 10).

That the survey *was never approved* is clearly shown by Exhibit I of the bill (p. 37), namely, the letter of Acting Commissioner Stone to the surveyor-general of Louisiana of May 21, 1891 (p. 44), in which it is stated that the survey of the back line of the grant "was accepted by

this office *to the extent of payment for the work, it having been done in accordance with his instructions*, BUT THE PLATS WERE WITHHELD FROM FILING, AWAITING THE DECISION OF THE DEPARTMENT AS TO THE CORRECTNESS OF THE INSTRUCTIONS, IN VIEW OF THE ORIGINAL DECISION OF THE DEPARTMENT IN THE CASE, DATED JANUARY 6, 1888" (6 L. D., 473). See, also, the concluding paragraph of the letter of Commissioner Groff (p. 47), whose action is that referred to in the letter of Acting Commissioner Stone.

The survey being thus held under advisement by the Department, in view of its strange and suspicious violation of the explicit instructions of the Department to the Surveyor-General, the Commissioner of the General Land Office applied to the Secretary of the Interior to know whether the decision of Secretary Lamar, of January 6, 1888, fixed absolutely the starting point of the back line of the grant at the most southern point of Lake Maurepas, as it existed at the date of the decision. To this the acting Secretary replied in the affirmative (Exhibit H, p. 36).

Thereupon the Commissioner of the Land Office rejected Paine's survey and ordered a new one. (Exhibit I, p. 37.)

Paine was employed to make the new survey, and this bill was filed to prevent him from doing so.

RESTRAINING ORDER AND DEMURRER.

A restraining order was issued on the filing of the bill, and a day fixed for the application for an injunction *pendente lite* (pp. 15, 16). On that day, January 9, 1892, the defendant demurred to the bill (p. 17).

HEARING AND DECREE.

On February 2, 1892, the cause came to a hearing on the demurrer, and a decree was entered dissolving the restraining order and denying the injunction and dismissing the bill, with costs (pp. 47, 48).

APPEAL TO CIRCUIT COURT OF APPEALS.

On February 8, 1891, an appeal to the circuit court of appeals was allowed (p. 49).

AFFIRMANCE.

The decree of the circuit court was affirmed by the Circuit Court of Appeals on June 20, 1892 (p. 55).

APPEAL TO THIS COURT.

On July 27, 1892, an appeal to this court was allowed by Mr. Justice Lamar (p. 56).

ARGUMENT.

THE JURISDICTIONAL QUESTIONS.

I.

An appeal to this court does not lie from the circuit court of appeals in such a case as this unless "the matter in controversy shall exceed $1,000 besides costs" (*Lau Ow. Bew* v. *United States*, 144 U. S., 47, 57). In this case, however, there is nothing in the record to show that any such amount is involved, while, on the other hand, there is ample to show that, in the nature of things, the matter in controversy does not admit of valuation by the standard of money.

If, as complainant contends, the back line of the Dupard grant has been already irrevocably determined by a lawful survey, what harm can come to complainant by the imaginary line of a new survey?

No Government survey is *conclusive* as to boundaries, and if the principle on which the new survey is to be made is erroneous, it can have no injurious effect if carried into operation, because the courts would refuse to respect it.

But, however that may be, there is nothing in the record to show that the matter in controversy "exceeds one thousand dollars and costs." The rhetoric of the bill is no evidence of value.

II.

EQUITY HAS NO JURISDICTION.

The theory of the bill is that the survey of 1890 is a final completed survey, and, consequently, that another survey for the same purpose is beyond the power of the Land Department of the Government, and, if made, would be void. Being void it would be no obstacle whatever an action at law and would not even raise a cloud on complainants' title.

III.

THIS CASE IS NOT WITHIN THE COGNIZANCE OF THE JUDICIAL DEPARTMENT.

So long as an executive act is *in fieri* it is beyond the reach of the judicial department. For that department to coerce an executive officer acting within the scope of his

powers would be to substitute judicial discretion, which the law does not require, for executive discretion, which the law does require.

The safety of the Federal Government depends on a strict recognition of the independence of each of the three coördinate Departments of the Government of the others, as this court observed in the *Sinking-Fund Cases* (99 U. S., p. 718). And it was in obedience to this cardinal principle of our federal polity that the circuit court dismissed the bill and that the circuit court of appeals affirmed that action.

The somewhat remarkable way in which the counsel for the appellant has attempted to make the impression that the Paine Survey of 1890 was finally approved and adopted by the Land Department of the United States, makes it necessary for us to state *that the record shows, conclusively, that said survey was not only not approved but* WAS REJECTED BY THE LAND DEPARTMENT. This fully appears by complainant's own Exhibits H and I (pp. 36 and 37).

Upon receipt of the survey in question from the surveyor-general of Louisiana, with his approval, the Commissioner of the Land Office addressed a communication to the surveyor-general, dated January 23, 1891 (pp. 45–47), which concludes as follows:

> In view of the foregoing and of the condition expressed in the contract allowing partial payments as the survey progresses, I hereby accept the survey as far as herein considered, and, as the several points of objection to the acceptance of some of the lines established in this survey, as set forth in the protests above mentioned, will necessarily demand a further consideration by this office, you are directed to withhold the filing of the triplicate plats from the local land office until you are further advised in regard thereto.

In other words, as the Acting Commissioner, Stone says in his letter to the surveyor-general of May 21, 1891, the survey "WAS ACCEPTED BY THIS OFFICE TO THE EXTENT OF PAYMENT FOR THE WORK, it having been done *in accordance with his instructions*, but the plats were withheld from filing, *awaiting the decision of the Department as to the correctness of the instructions*, in view of the original decision of the Department in the case dated January 6, 1888. (6 L. D., 473)."

The judge of the circuit court, in his opinion (p. 52), says, "The survey so made *was never approved by the Department*," and the circuit court of appeals, in its opinion, says that the Commissioner of the Land Office approved the Survey "ONLY SO FAR AS DISBURSEMENTS HAVE BEEN MADE," and "RESERVED THE QUESTION AS TO THE CORRECT LOCATION OF THE REAR LINE OF THE GRANT FOR FURTHER CONSIDERATION AND ADVICE" (p. 63).

We think, therefore, that we are quite warranted in saying that it is very remarkable that the counsel for appellant should advance, in *full-face type*, the proposition that the survey had been approved and finally disposed of by the Land Department (see brief, pp. 7 and 22), and that that Department had become entirely *functus officio* as to the same, thus simply begging the fundamental question in the case, and ignoring a fact which is seen by everybody but himself.

But he goes further, and denies, with emphasis, the right of the successor of Secretary Lamar to interpret the decision of the latter of January 6, 1888, for the enlightenment and guidance of the surveyor-general; so that,

according to this argument, the final interpretation of Secretary Lamar's decision was with the surveyor-general and not the Secretary of the Interior.

The inadmissibility of any such theory could not be better exemplified than by this very case, for it will be remembered that the surveyor-general, in giving instructions for the survey in question, directed his deputy to find the location of the southern shore of Lake Maurepas, his initial point, *as it was in 1769*, by something of a guessing process, and then proceed to run the line. To say, then, that this attempt to put the survey on so mythical a basis, the absurdity of which had been pointed out by Secretary Lamar, must succeed through the powerlessness of the Secretary of the Interior to correct it, is simply running the argument into the ground.

The averment in the bill (p. 8) that the instructions under which Paine made the survey relied on were submitted to the Secretary and approved is countervailed and shown to be false by the complainant's own Exhibit H (p. 36), which is as much a part of the bill as the averment in question, which averment must have been treated by the courts below as false. It is true, the bill is sworn to, but facts are not established by *swearing* only, but by *swearing credibly*. As between the averment in the bill and Exhibit H the mind can not hesitate as to what the real fact is. It seems too absurd for argument that Exhibit H could have been applied for or written if the averment in the bill is true in point of fact, especially when we reflect that Secretary Noble was in office at the date of the instructions, November 11, 1889 (p. 27), and

that nothing is more improbable than that his Acting Secretary, Mr. Chandler, would have involved him in the contradictory action embodied in Exhibit H, if the averment in the bill is true.

While there is nothing in the bill to justify an imputation, it is nevertheless noticeable that the surveyor-general who gave the perversely wrong instructions, Calhoun Fluker, *is one of the sureties on the appeal bond* (p. 50), a fact that is suggestive, perhaps.

We are credibly informed that the survey which it was the purpose of the bill to enjoin *has been already executed by another deputy*, and is now being inspected preparatory to approval. This fact can be established by the Secretary of the Interior if denied by the learned counsel for the appellant. It is presumed the court will hear evidence as to whether the case now before them involves only a moot question, if the fact is contested.

This brief may, therefore, be safely concluded by referring the court to the opinions of the circuit court (pp. 52–54) and the circuit court of appeals (pp. 57–64).

It is respectfully submitted that there is manifestly no error which calls for a disturbance of the decree.

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